Supreme Court, U.S.
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No.

In the Supreme Court of the United States

BRANDON WADE HEIN, ET AL.,
PETITIONERS,

v.

WILLIAM JOSEPH SULLIVAN, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit erred by holding, in conflict with decisions of this Court and other courts of appeals, that the prosecution's knowing use of fundamentally misleading evidence did not violate the Due Process Clause and require a new trial.

LIST OF PARTIES

Petitioner Brandon Wade Hein was the petitioner in the district court in case number CV 04-3502-SJO(MLG) and petitioner-appellant in the court of appeals in case number 07-56277. Respondent William Joseph Sullivan, Warden of the California Correctional Institution at Tehachapi, California, was the corresponding respondent-appellee in the appellate court. Sullivan was substituted for Michael G. Yarborough, Warden, the respondent in the district court.

Petitioner Tony Miliotti was the petitioner in the district court in case number CV 04-3491-SJO(MLG) and petitioner-appellant in the court of appeals in case number 07-56288. Respondent Jim Hall, Warden, was the corresponding respondent in the district court and respondent-appellee in the court of appeals.

Petitioner Jason Skip Holland was the petitioner in the district court in case number CV 04-3416-SJO(MLG) and petitioner-appellant in the court of appeals in case number 07-56365. Respondent Al Scribner, Warden, was the corresponding respondent-appellee in the court of appeals. Scribner was substituted for George Ortiz, Warden, the respondent in the district court.

Petitioner Micah Holland was the petitioner in the district court in case number CV 04-3407-SJO(MLG) and petitioner-appellant in the court of appeals in case number 07-56367. Respondent Derral G. Adams, Warden, was the corresponding respondent in the district court and respondent-appellee in the court of appeals.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 15

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS 16

A. Testimony Is "False" For Purposes Of The *Napue* Rule If It Creates A Materially Misleading Impression 16

B. The Prosecution Knowingly Presented Testimony Here That, Taken As A Whole, *At Least* Left The Jury With A False Impression 20

C. The Prosecution's Knowing Presentation Of Misleading Testimony Was Material And Requires Reversal 25

TABLE OF CONTENTS—Continued

Page

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THE MAJORITY OF COURTS OF APPEALS 28

A. The Ninth Circuit's Reasoning Conflicts With The Settled Law Of Seven Circuits 29

B. The Ninth Circuit's Reasoning Is Consistent With Recent Precedents From The Sixth, Eighth, And Eleventh Circuits 34

III. THIS CASE PRESENTS ISSUES OF NATIONAL IMPORTANCE 36

CONCLUSION 37

APPENDIX

Opinion of the United States Court of Appeals for the Ninth Circuit, *Hein v. Sullivan*, 601 F.3d 897 (9th Cir. 2010) 1a

Report and Recommendation of United States Magistrate Judge of the United States District Court for the Central District of California, *Holland v. Adams*, Nos. 04-3502, 04-3407, 04-3416, 04-3491-SJO (MLG) (C.D. Cal. Apr. 3, 2007) 42a

APPENDIX TABLE OF CONTENTS—Continued

Page

Order of the United States District Court for the Central District of California Accepting and Adopting Findings and Recommendations of United States Magistrate Judge, *Hein v. Sullivan*, No. 04-3502-SJO (MLG) (C.D. Cal. Aug. 9, 2007).....118a

Order of the United States Court of Appeals for the Ninth Circuit Denying Rehearing, *Hein v. Sullivan*, Nos. 07-56277, 07-562788, 07-56365, 0756367 (9th Cir. July 16, 2010).....120a

28 U.S.C. § 2254(d).....122a

Letter from Jeff Semow to Mr. Sorkin regarding Michael McLoren's immunity agreement, dated July 10, 1995 [ER*-200].....123a

Declaration of Tracy Dressner dated July 11, 2002, attaching transcript of William Gazecki's videotaped interview with Jeff Semow regarding Michael McLoren's immunity agreement [ER-249-51].....124a

Excerpts of Reporter's Trial Transcript—Prosecution Initial Summation [ER-743, 752].....128a

---

* "ER" refers to the Excerpts of Record filed in the 9th Circuit.

APPENDIX TABLE OF CONTENTS—Continued

Page

Excerpts of Reporter's Trial Transcript—
Prosecution Rebuttal Summation [ER-778-
79, 814-15, 839] 130a

TABLE OF AUTHORITIES

Page(s)

Akrawi v. Booker,
572 F.3d 252 (6th Cir. 2009) 35

Alcorta v. Texas,
355 U.S. 28 (1957) 2, 16, 17, 23

Armour v. Salisbury,
492 F.2d 1032 (6th Cir. 1974) 35

Blankenship v. Estelle,
545 F.2d 510 (5th Cir. 1977) 30

Boone v. Paderick,
541 F.2d 447 (4th Cir. 1976) 31, 32

Byrd v. Collins,
209 F.3d 486 (6th Cir. 2000), *cert. denied*,
531 U.S. 1082 (2001) 35

Darden v. Wainwright,
477 U.S. 168 (1986) 14

DeMarco v. United States,
928 F.2d 1074 (11th Cir. 1991) 23

Drake v. Portuondo,
553 F.3d 230 (2d Cir. 2009) 31

Dupart v. United States,
541 F.2d 1148 (5th Cir. 1976) 30, 36

TABLE OF AUTHORITIES—Continued

Page(s)

Ciglio v. United States,
405 U.S. 150 (1972) 2, 18, 19, 23, 26

Hammond v. Hall,
586 F.3d 1289 (11th Cir. 2009) 36

Hayes v. Brown,
399 F.3d 972 (9th Cir. 2005) 14

Hein v. California,
534 U.S. 890 (2001) 13

Jenkins v. Artuz,
294 F.3d 284 (2d Cir. 2002) 31

Monroe v. Angelone,
323 F.3d 286 (4th Cir. 2003) 32

Napue v. Illinois,
360 U.S. 264 (1959) 2, 15, 21

Pederson v. Fabian,
491 F.3d 816 (8th Cir. 2007) 35

People v. Hein,
86 Cal. App. 4th 683 (2001) 12

People v. Hein,
No. S095461, 2001 Cal. LEXIS 2611 (Apr. 25, 2001) 12

Smith v. Secretary, Department of Corrections,
572 F.3d 1327 (11th Cir. 2009) 36

TABLE OF AUTHORITIES—Continued

Page(s)

Tassin v. Cain,
482 F. Supp. 2d 764 (E.D. La. 2007), *aff'd*,
517 F.3d 770 (5th Cir. 2008) 30

Tejada v. Dugger,
941 F.2d 1551 (11th Cir. 1991), *cert. denied*,
502 U.S. 1105 (1992) 36

United States v. Agurs,
427 U.S. 97 (1976) 2, 15

United States v. Bagley,
473 U.S. 667 (1985) 19, 20, 25

United States v. Barham,
595 F.2d 231 (5th Cir. 1979) 29

United States v. Bynum,
567 F.2d 1167 (1st Cir. 1978).....33, 34

United States v. Casas,
425 F.3d 23 (1st Cir. 2005), *cert. denied*, 546
U.S. 1199 *and* 547 U.S. 1061 (2006) 33

United States v. Harris,
498 F.2d 1164 (3d Cir.), *cert. denied*, 419
U.S. 1069 (1974) 33, 34

United States v. Iverson,
637 F.2d 799 (D.C. Cir. 1980) 24, 32

United States v. Lochmondy,
890 F.2d 817 (6th Cir. 1989) 35

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. McClintic,
570 F.2d 685 (8th Cir. 1978) 35

United States v. Morris,
498 F.3d 634 (7th Cir. 2007), *cert. denied*,
553 U.S. 1065 (2008) 34

United States v. Rivera Pedin,
861 F.2d 1522 (11th Cir. 1988) 36

United States v. Stadtmauer,
No. 09-1575, 2010 U.S. App. LEXIS 18851
(3d Cir. Sept. 9, 2010) 33

United States v. Sutton,
542 F.2d 1239 (4th Cir. 1976) 32

United States v. Vozzella,
124 F.3d 389 (2d Cir. 1997) 31

United States v. Wallach,
935 F.2d 445 (2d Cir. 1991) 14

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. amend. XIV, § 1 1

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2254(d) 1

TABLE OF AUTHORITIES—Continued

Page(s)

28 U.S.C. § 2254(d)(1) 16

OTHER AUTHORITY

Mary Jayne McKay, *Life in Prison: Felony Murder, Arrested In Fistfight, Teen In Prison For Life*, 60 Minutes (CBS Jan. 29, 2003), http://www.cbsnews.com/stories/2003/01/29/60II/main538407.shtml 3

Reckless Indifference (Dale Rosenbloom/William Gazecki 2000), http://www.recklessindifference.com (last visited Nov. 8, 2010) 3

Randall Sullivan, *Lynching in Malibu: A Tale of Fear, Retribution and Injustice In The War Against Youth*, Rolling Stone, Sept. 4, 1997, at 45 3

OPINIONS BELOW

The Ninth Circuit's consolidated opinion is reported as *Hein v. Sullivan*, 601 F.3d 897 (9th Cir. 2010) (Pet.App.1a-41a). Its order denying the petitions for rehearing and rehearing *en banc* is reproduced at Pet.App.120a-21a. The magistrate's report and district court's opinion are reproduced at Pet.App.42a-119a.

JURISDICTION

The Ninth Circuit's opinion was issued on April 12, 2010. A petition for rehearing and rehearing *en banc* was denied on July 16, 2010. On September 27, 2010, Justice Kennedy extended the time to file the petition for certiorari to and including November 15, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment, in relevant part, provides: "No State shall ... deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The text of 28 U.S.C. § 2254(d), governing habeas corpus petitions for prisoners in state custody, is reproduced at Pet.App.122a.

STATEMENT OF THE CASE

In 1995, a backyard fight among six teenage boys ended in an ill-fated and unintentional death. A year later, a California jury convicted four of the boys (petitioners) of first degree felony murder, based primarily on the testimony of a single witness who claimed that the fight broke out because petitioners were trying to steal marijuana that he kept (and sold) in a shed behind his family's house. At trial, that witness made numerous statements suggesting that he

was risking prosecution by testifying about his drug dealing, when in fact the prosecutor had provided him with a written immunity agreement. The prosecutor later told the jury that it should believe the witness because he exposed himself to "criminal liability" by testifying.

Under any fair reading of this Court's precedents, these statements constituted the knowing presentation of "false" evidence because, "taken as a whole," they gave the jury a "false impression." *Alcorta v. Texas*, 355 U.S. 28, 31 (1957). Reversal therefore was required if there was "any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103 (1976); *see also Giglio v. United States*, 405 U.S. 150, 154 (1972) (citing *Napue v. Illinois*, 360 U.S. 264, 271 (1959)). This Court applies such a "strict standard of materiality" in *Napue* cases "not just because they involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth-seeking function of the trial process." *Agurs*, 427 U.S. at 104. The Ninth Circuit evaded these well-established rules by holding that testimony is not "false" for purposes of the *Napue / Giglio* rule so long as it is susceptible to any interpretation that would render it literally true—regardless of how misleading it is, and regardless of its likely effect on the jury. That holding widens an existing circuit split and threatens to revive the prosecutorial deception and gamesmanship that *Napue* and *Giglio* were meant to eliminate.

Review is warranted.

Factual History

1. The facts of this case, which can only be described as tragic, have been the subject of

considerable commentary and media attention, including a feature article in Rolling Stone magazine,[1] a January 29, 2003 episode of 60 Minutes II,[2] and the award-winning documentary, *Reckless Indifference*.[3]

Petitioners are two brothers (Micah and Jason Holland) and two of their friends (Brandon Hein and Tony Miliotti) who were aged 15-18 at the time of the crime. On the afternoon of May 22, 1995, petitioners and a friend (Chris Velardo) were hanging out together—drinking, driving around, and engaging in petty crime. Early that evening, the group went to the home of Michael McLoren, a 16-year old high school acquaintance who was known to sell marijuana, to—in the words of the only person to overhear their intentions—go "buy" or "get" some marijuana. Pet.App.13a. McLoren kept the marijuana hidden in a shed in his family's backyard. Pet.App.4a.

Petitioners arrived to find McLoren in the backyard with Jimmy Farris, the son of a Los Angeles police detective. According to McLoren, petitioners approached the shed without speaking and Micah walked inside, followed quickly by McLoren, Micah's brother Jason, and Hein. *Id.* McLoren testified that Micah tugged on the locked drawer where McLoren

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[1] Randall Sullivan, *Lynching in Malibu: A Tale of Fear, Retribution and Injustice In The War Against Youth*, Rolling Stone, Sept. 4, 1997, at 45.

[2] *See* Mary Jayne McKay, *Life in Prison: Felony Murder, Arrested In Fistfight, Teen In Prison For Life*, 60 Minutes (CBS Jan. 29, 2003), http://www.cbsnews.com/stories/2003/01/29/6011/main538407.shtml.

[3] *Reckless Indifference* (Dale Rosenbloom/William Gazecki 2000), http://www.recklessindifference.com/ (last visited Nov. 8, 2010).

kept his supply of marijuana and demanded the keys. *Id.* At that time, Micah was 15 years old, 5' 3" tall and 110 pounds. McLoren was 16, seven inches taller and 35 pounds heavier. ER-349.[4] After a brief exchange of words, a fight erupted. Farris entered the shed to help McLoren. In the ensuing fracas, McLoren "held Micah's face down in a headlock on the bed and repeatedly elbowed him in the back and neck." Pet.App.45a. Micah's older brother Jason (5' 7" and 130 pounds) "attempted to pull McLoren off his brother and McLoren kicked Jason in the face." *Id.* Jason then stabbed at McLoren three times with a small pocket knife and, after Farris (5' 11" and 175 pounds) spun Jason around to confront him, Jason stabbed at Farris too. *Id.* One of the small puncture wounds nicked Farris's heart, and he died from internal bleeding. Pet.App.5a. No one has ever suggested that Jason intended to kill Farris. *See* ER-756.

2. Rather than charge Jason Holland alone with some form of manslaughter or homicide, the prosecution theorized that petitioners all went to McLoren's house with the intent to *steal* marijuana. Pet.App.46a. Because Jimmy Farris was killed in the course of this purported "burglary" of a backyard shed, the prosecution could charge all four boys—including 15-year-old Micah—with first degree felony murder and seek life sentences.

As the district court recognized, "McLoren's eye-witness account of Micah's demands and threatening behavior as well as the subsequent fight provided the

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[4] "ER" refers to the Excerpts of Record filed in this case in the 9th Circuit, Case Nos. 07-56277 et al. "CT" refers to the Clerk's Transcript filed in this case in the Court of Appeal for the State of California, No. SA022108.

only direct evidence of Petitioners' intent to steal the marijuana at the [shed]." Pet.App.47a. Yet in the six weeks after the May 22, 1995 incident, McLoren told different stories about the cause of the fight to nearly everyone who asked—and never once suggested that it was motivated by an attempted theft of marijuana.[5]

According to McLoren, he was initially reluctant to tell the truth because he "was doing illegal things" and did not feel he "could tell the police everything and talk to them openly and not suffer the consequences from it." Pet.App.57a. Recognizing the need for McLoren's testimony, Assistant District Attorney Jeff Semow met with McLoren and his attorney and promised McLoren immunity for anything he told the prosecution about marijuana, memorializing the agreement with an immunity letter dated July 10, 1995. Pet.App.123a.

McLoren's immunity agreement was unquestionably valuable impeachment evidence. Semow later recalled being very concerned that the immunity deal would undermine McLoren's credibility because, in Semow's words, "the defense would be able to spin that and say that I bought his testimony" and "bought lies from him instead." Pet.App.126a-27a.

On July 24, 1995, there was a juvenile fitness hearing for Micah, Miliotti, and Velardo. The hearing was entirely separate from the criminal proceedings—presided over by a different judge in a different court. Jason Holland and Hein were not present or represented. ER-243. Micah Holland's criminal trial counsel James Sussman was not present, although

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[5] *See* Pet.App.63a-66a. Although the State has argued that McLoren was consistent in his claim that petitioners came to rob him, on more than one occasion he described the incident as simply a "fight" without mentioning a theft of any sort. *See* Pet.App.65a.

another attorney made an appearance. Pet.App.58a. At the hearing, Velardo's counsel Bruce Jones asked Semow if there was "any more discovery." Pet.App.57a. Specifically, Jones referenced a meeting in the D.A.'s office where "an immunity agreement for Mr. McLoren" was discussed. Pet.App.57a-58a. Semow replied: "There is no immunity agreement for Mr. McLoren, other than I promised him in writing that nothing that he said in this case about Marijuana, would be used as evidence against him. That is it." Pet.App.58a. As the district court noted, "[t]here was no other discussion about the immunity letter, including whether it would be turned over to defense counsel." *Id.*

In the criminal proceedings, petitioners' counsel made repeated demands for any exculpatory evidence in the prosecution's possession (ER-223-27; CT-294-301, 327-33), including requesting "all deals, favors, promises or agreements made or entered into between law enforcement, and/or the prosecution and [informant] witnesses." ER-226. Despite those demands, and the trial court directing the release of, *inter alia*, "a July 10 letter from the district attorney," the immunity letter was never produced to counsel for petitioners Micah Holland, Jason Holland, or Brandon Hein. Pet.App.59a, 60a-61a.[6]

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[6] In early 2002, Miliotti's habeas counsel found a copy of the July 10 letter in Miliotti's file. Miliotti's trial counsel could not recall ever having seen the letter, but upon review of the juvenile fitness hearing transcript remembered learning of the letter's existence in juvenile court. Pet.App.15a. His failure to recall the letter's existence at trial was the subject of an ineffective assistance claim below.

3. In the absence of proper disclosure of this impeachment evidence, McLoren and the prosecution were free to bolster McLoren's credibility by implying that he was willing to testify about his marijuana dealings at great risk to himself. After reviewing the state trial transcript, the district court found that "McLoren's statements suggesting that he had not received immunity [were] clearly false." Pet.App.80a. The court further found that "the prosecution condoned and then made use of [the] false/misleading testimony" in its closing argument. Pet.App.80a.

* Direct Examination of McLoren

On direct examination, McLoren indicated that he still faced the possibility of being prosecuted for marijuana dealing, but was willing to "take the drug charge" in order to testify truthfully and see that justice was done:

> Q. By [Deputy District Attorney] Mr. Latin: Do you remember ... essentially what [the police officers] told you [at the hospital]?
>
> A. They don't want to prosecute me for it [marijuana]. They just want to get these guys.
>
> * * * *
>
> Q. By Mr. Latin: Since that initial interview with [d]etectives ... when questioned by either law enforcement officers or district attorneys, have you ever made any effort to hide the fact that you possessed or sold marijuana?
>
> A. No.
>
> * * * *
>
> Q. Are there *any other* reasons other than what Detective Tauson told you at the hospital that

caused you to no longer want to hide the fact that you had marijuana?

* * * *

A. Yes. My grandma told me just to *take the drug charge* and just bust them.

ER-455-55a (emphasis added).

The prosecution further elicited that McLoren did not feel inhibited admitting to drug dealing during trial solely because he was brave and wanted to see the defendants convicted:

Q. By Mr. Latin: As you sit here and testify in this court do you feel inhibited or deterred in any way from talking about your prior dealings with marijuana?

* * * *

THE WITNESS: No. I feel fine talking about it.

Q. By Mr. Latin: Why? Can you explain why?

A. Because it's something I have to do.

Q. Why?

A. Because I want to get these guys that stabbed me and killed my friend.

ER-456-57.

* <u>Cross-Examination of McLoren</u>

Unaware of the immunity agreement, defense counsel for Jason, Micah, and Hein were unable to undermine the impression that McLoren's testimony could be used against him and that he was still facing prosecution:

Q. You hired a lawyer; is that correct?

A. Yes.

Q. Is that one of the things that the lawyer dealt with, was whether you were going to be prosecuted for any of those things?

A. Yes.

Q. *And did that lawyer give you any assurances in terms of whether you would be prosecuted or not?*

A. *No, not really.*

ER-709-10 (emphasis added). McLoren further testified that he understood the police had "reserved the option" to prosecute him. ER-514.

* Re-Direct Examination of McLoren

On re-direct examination, the prosecution again elicited the false testimony that McLoren was willing to incriminate himself by testifying in order to seek justice for his fallen friend:

Q. When you learned that Jimmy had died ... did you think about what you were going to say about the marijuana inside?

A. Possibly, but I can't remember.

Q. Were you starting to think about the fact that you should tell the truth about it?

* * * *

The Witness: Yes.

* * * *

Q. By Mr. Latin: Did you have a discussion with somebody about the subject?

A. Yes.

Q. Who did you talk to?

A. My grandma.

* * * *

Q. By Mr. Latin: What did you[r] grandma tell you?

A. She told me just to—that they found the dope and *just to take the drug charge* and get these guys.

ER-679-80 (emphasis added).

The prosecutor then asked McLoren about the meeting with his attorney and D.A. Semow, and again the immunity agreement went unacknowledged:

Q. Did there come a time when you felt ready to tell the truth about your involvement with marijuana, the extent of your dealing in marijuana, the extent of your use of marijuana to the authorities?

A. Yes.

Q. What brought that about?

A. My lawyer told me that I wasn't going to be able to get these guys until I tell the whole truth.

Q. Who did you talk to first from law enforcement ... where you ... for the first time felt that you could be open about yourself and the things that you had done in your life?

A. Jeff Semow.

Q. Was that after your conversation with your lawyer?

A. Yes.

Q. Did you tell Mr. Semow about your dealings in marijuana?

A. Yes.

Q. Did you hide anything during that interview about your involvement with marijuana?

A. No.

Q. How did it feel to talk openly about it?

A. I think it made me real uncomfortable.

Q. You didn't know for sure whether you could trust Mr. Semow?

A. Yes.

Q. Did you continue to talk about it?

A. Yes.

Q. Did your feelings change over time?

A. So-so.

Q. Do you still feel uncomfortable talking about it?

A. Somewhat.

Q. Why are you talking about it anyhow?

A. Because it's more important to get these guys than drugs.

ER-681-83.

* Closing Argument

The prosecution spent a significant part of its closing and rebuttal on McLoren's credibility. D.D.A. Michael Latin argued that McLoren was a credible witness who "t[old] the jury the truth about everything" and was motivated only by a desire "to see justice done." Pet.App.129a, 128a. Latin claimed that he never tried to hide any evidence concerning McLoren. Pet.App.130a.

Latin also argued that McLoren's willingness to testify openly about his own mistakes was a sign of his credibility. *See, e.g.*, Pet.App.132a ("Think about how honest he was about some very, very painful things in his life, some things that were embarrassing, some things that hold himself out to the public as not a very good person. He was so honest about it. That's the

kind of integrity that our system would like to see. It really is."). And, ultimately, Latin told the jury that it should believe McLoren because he "opened himself up to embarrassment, scorn, ridicule, contempt *and criminal liability*, but he did it because he understood that that is what it takes to tell the truth and be believed." Pet.App.131a (emphasis added).

4. On May 28, 1996, following a two-month jury trial, petitioners were convicted of first degree burglary, first degree attempted robbery, and first degree felony murder with the special circumstances of murder during a burglary and a robbery. Petitioner Jason Holland was sentenced to life without the possibility of parole plus eight years. Petitioners Hein and Miliotti were sentenced to life without the possibility of parole plus four years. Petitioner Micah Holland—who was only 15 years old at the time of the crime—was sentenced to twenty-nine years to life, and now has already spent half of his life in prison. Pet.App.49a.

State Post-Conviction Proceedings

On January 29, 2001, the California Court of Appeal affirmed petitioners' convictions in a partially published opinion.[7] *People v. Hein*, 86 Cal. App. 4th 683 (2001). The California Supreme Court denied petitioners' petitions for review on April 25, 2001 and ordered the appellate opinion depublished. *People v. Hein*, No. S095461, 2001 Cal. LEXIS 2611 (Apr. 25, 2001). This Court denied a petition for a writ of

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[7] The court struck the special circumstance allegation as to Miliotti, finding the evidence insufficient to prove that Miliotti was a major participant in the burglary or attempted robbery, and reduced Miliotti's conviction to second degree murder, resulting in a new sentence of 15 years to life plus 4 years. ER-124, 128-29.

certiorari by Hein on October 1, 2001. *Hein v. California*, 534 U.S. 890 (2001). Petitioners filed separate habeas petitions with the California Supreme Court which were summarily denied without explanation on May 12, 2004. ER-93-96.

Federal Habeas Proceedings

1. Petitioners filed separate petitions for a writ of habeas corpus in the United States District Court of the Central District of California, which were assigned to the same magistrate judge and district judge. ER-847-69. On April 3, 2007, the magistrate judge filed a joint Report and Recommendation. The magistrate found that the immunity letter was exculpatory evidence and was wrongly suppressed by the government, but held that the *Brady* violation was immaterial. Pet.App.62a-64a.

The magistrate next concluded that "McLoren's statements suggesting that he had not received immunity [were] clearly false." Pet.App.80a. "In addition," D.D.A. Latin "made statements in closing rebuttal argument which gave the impression that McLoren had received no promises prior to his testimony." *Id.* But the magistrate concluded that a new trial was not required because McLoren consistently testified that petitioners intended to rob him and because his testimony supposedly was "supported by substantial corroborating evidence," including petitioners' petty crime that afternoon and testimony by a neighbor who viewed petitioners after the fight. Pet.App.82a-84a. The magistrate recommended that the habeas petitions be denied. The district court adopted the Report and Recommendation without modification.

2. The Ninth Circuit affirmed, but on different grounds. The Ninth Circuit previously had held that the *Napue* materiality standard for knowing presentation of false evidence is very strict and requires "'virtually automatic'" reversal. *See Hayes v. Brown*, 399 F.3d 972, 978 (9th Cir. 2005) (en banc) (quoting *United States v. Wallach*, 935 F.2d 445, 456 (2d Cir. 1991)). To evade that precedent, the panel disagreed with the district court and held that *none* of McLoren's statements were actually "false." Pet.App.18a-27a. "[A] few of McLoren's statements at trial were incomplete," the court allowed, but "the critical point of McLoren's testimony, to wit, that he could still be prosecuted for marijuana possession or sale, was true." Pet.App.19a. The Ninth Circuit reasoned that, because McLoren only received use immunity, it was "not false" for him to testify that he still faced "potential prosecution." Pet.App.22a. The court of appeals further opined that the reasons McLoren gave for his willingness to be a witness were not "facially false" or "perjurious." Pet.App.25a. And it held that "[a]s none of McLoren's answers to Latin's open-ended questions were false, Latin had no duty to clarify McLoren's answers or to question McLoren specifically about the use immunity he received." Pet.App.27a.

The Ninth Circuit concluded that there was no knowing presentation of false evidence and never applied *Napue*'s stringent materiality standard. Instead, it evaluated the prosecution's misleading statements alone to determine whether they "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Pet.App.28a (quoting *Darden v. Wainwright*, 477 U.S.

168, 181 (1986)). The court of appeals reasoned that the trial court had mitigated much of the potential prejudice from these misstatements by sustaining objections and giving cautionary instructions. Pet.App.35a. The Ninth Circuit also found that Latin's "problematic" statement that McLoren had "opened himself up to ... criminal liability" was "ambiguous" because Latin could have meant "that McLoren's testimony exposed him to charges of *perjury* if he lied on the stand." Pet.App.30a-31a (emphasis added). The Ninth Circuit reasoned that in any event the statement "would not have helped the prosecution's case much anyway since McLoren had little incentive to lie." Pet.App.35a-36a. Finally, it concluded that "the prosecution offered the only believable theory for why the fight began in the first place, i.e., that it had been instigated by Micah's attempted robbery of McLoren's drugs." Pet.App.36a.

The Ninth Circuit thus affirmed the district court's denial of habeas relief. Pet.App.41a.

REASONS FOR GRANTING THE WRIT

As this Court has repeatedly held, "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment," *Napue*, 360 U.S. at 269, so long as there was "any reasonable likelihood that the false testimony could have affected the judgment of the jury," *Agurs*, 427 U.S. at 103.

The Ninth Circuit held that the *Napue* rule is implicated only when testimony cannot be understood in any way that would be literally truthful—no matter how misleading it might be in context. That holding is inconsistent with this Court's precedents, which have always applied *Napue* when testimony is likely to leave

the jury with a materially misleading impression even if it is not literally false. It also deepens a robust existing circuit split.

Federal courts may grant relief on habeas petitions where the State court's determination "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). As set forth below, the denial of relief in this matter is in direct conflict with the well-settled decisions of this Court.

This issue is of great importance to the administration of justice, and the Ninth Circuit's rule encourages prosecutors to engage in egregious gamesmanship. Review is warranted.

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS

A. Testimony Is "False" For Purposes Of The *Napue* Rule If It Creates A Materially Misleading Impression

Testimony is "false" for *Napue* purposes if, taken as a whole, it creates a materially misleading impression of the facts. This rule dates to at least *Alcorta v. Texas*, 355 U.S. 28 (1957)—a decision upon which *Napue* expressly relied.

In *Alcorta*, a defendant charged with murdering his wife claimed he had acted in a fit of passion when he observed her kissing another man in his car. The other man, Castilleja, was also the prosecution's key witness.

When asked what had happened in the car, Castilleja mentioned only a brief discussion about going to church and did not volunteer that he had kissed the

defendant's wife. The prosecution then engaged in the following colloquy with Castilleja:

> Q. ... [W]ere you in love with [the defendant's wife]?
>
> A. No.
>
> Q. Was she in love with you?
>
> A. No.
>
> Q. Had you ever talked about love?
>
> A. No.
>
> Q. Had you ever had any dates with her other than to take her home?
>
> A. No. Well, just when I brought her from there.
>
> Q. Just when you brought her from work?
>
> A. Yes.

355 U.S. at 30.

After trial, it was discovered that Castilleja had engaged in a brief sexual relationship with the defendant's wife and had informed the prosecution of it before trial. *Id.* at 30-31. The prosecutor instructed Castilleja not to volunteer information about the fling but to answer any specific questions about it truthfully. *Id.* at 31.

None of Castilleja's answers were perjurious. This Court cited no evidence that Castilleja and the defendant's wife were "in love" or that they had been on "dates" other than the occasions he had driven her home. The problem, this Court explained, was that "Castilleja's testimony, *taken as a whole*, gave the jury the *false impression* that his relationship with petitioner's wife was nothing more than that of casual friendship." *Id.* (emphasis added). On this basis, this

Court found a due process violation and reversed the defendant's conviction.

Later decisions affirm *Alcorta*'s holding. In *Giglio v. United States*, 405 U.S. 150 (1972), one prosecutor involved only at the grand jury stage told an unindicted co-conspirator—Taliento—that he would not be charged if he offered testimony against the defendant. The trial prosecutors were never informed of this promise and, before trial, the United States Attorney clarified to Taliento that he "would definitely be prosecuted if he did not testify and that if he did testify he would be obliged to rely on the 'good judgment and conscience of the Government' as to whether he would be prosecuted." 405 U.S. at 153. At trial, Taliento was asked a series of questions about any inducements he received to testify:

> [Counsel.] Did anybody tell you at any time that if you implicated somebody else in this case that you yourself would not be prosecuted?
>
> [Taliento.] Nobody told me I wouldn't be prosecuted.
>
> Q. They told you you might not be prosecuted?
>
> A. I believe I still could be prosecuted.
>
> * * * *
>
> Q. Were you ever arrested in this case or charged with anything in connection with these money orders that you testified to?
>
> A. Not at that particular time.
>
> Q. To this date, have you been charged with any crime?
>
> A. Not that I know of, unless they are still going to prosecute.

Id. at 151-52 (alterations in original). In summation, the prosecution stated that Taliento "received no promises that he would not be indicted." *Id.* at 152.

None of this testimony is literally false (indeed, it mirrors almost identically the testimony given by McLoren). The closest Taliento came to outright perjury was his response to the first question, but even that answer was arguably literally correct since it does not appear that his immunity deal required him to "implicate" somebody else and because the record is somewhat murky as to exactly what Taliento was promised. After that, each of Taliento's answers were literally true. Once again, however, this Court found that the jury was misled and reversed the conviction.

Finally, *United States v. Bagley*, 473 U.S. 667 (1985) is instructive. Though itself a *Brady* non-disclosure case, *Bagley* discussed the history of the *Brady* and *Napue* lines of cases and described them as different points along a common spectrum of prosecutorial misconduct. 473 U.S. at 678-79 & n.8 ("[T]he *Brady* rule has its roots in a series of cases dealing with convictions based on the prosecution's knowing use of perjured testimony."). *Bagley* recognized that *Napue* violations represent a more serious form of misconduct and greater "'corruption of the truth-seeking function of the trial process,'" and thus are subject to a more stringent standard of review. *Id.* (citation omitted).

In *Bagley*, the defendant was found guilty of narcotics charges based primarily on the testimony of two undercover officers. *Id.* at 670-71. Prior to trial, Bagley requested "'any deals, promises or inducements made to witnesses in exchange for their testimony.'" *Id.* at 669 (citation omitted). The Government did not produce anything in response to this request, but

separately provided affidavits signed by the officers during the course of the undercover operation. *Id.* at 670. Each affidavit concluded: "'I made this statement freely and voluntarily without any threats or rewards, or promises of reward having been made to me in return for it.'" *Id.* (citation omitted). In fact, however, both agents had entered into written agreements to receive cash compensation if their assistance—though not their testimony, *per se*—led to the "'accomplishment of the objective sought to be obtained by the use of such information to the satisfaction of [the ATF] Regional Director.'" *Id.* at 671 (citation omitted). This Court held that while the Government was "technically correct" that the agreements were not a promise of compensation in exchange for testimony, "the natural effect of these affidavits would be *misleadingly* to induce defense counsel to believe that [the witnesses] provided the information in the affidavits, and ultimately their testimony at trial recounting the same information, without any 'inducements.'" *Id.* at 684 (emphasis added). Thus, as in *Alcorta* and *Giglio*, the Court in *Bagley* held that the issue is whether withholding the true state of facts produced a misleading effect.

B. The Prosecution Knowingly Presented Testimony Here That, Taken As A Whole, *At Least* Left The Jury With A False Impression

McLoren's testimony was "false" within the meaning of clearly established federal law, because taken as a whole it conveyed a materially misleading impression to the jury.

1. First, McLoren claimed that his lawyer had not provided him with "any assurances" regarding whether

he would be prosecuted for his marijuana dealing. Pet.App.19a-21a; *supra* at 8-9. Because McLoren's attorney had, in fact, secured him an immunity deal, the district court found this statement false. On appeal, the State itself conceded that McLoren's statement was "arguably false or misleading." State's Opening Brief on Appeal at 69 (9th Cir. Aug. 18, 2008). The Ninth Circuit, however, concluded it was not literally false because McLoren had received only use immunity, and thus theoretically could have been prosecuted using evidence other than his testimony. Pet.App.22a-23a.

This conclusion is not sustainable under *Alcorta*. McLoren's lawyer clearly gave him *some* assurances about his exposure to prosecution, even if they were limited to use immunity. And the immunity issue was relevant at trial only to the extent that it bore on the credibility of McLoren's statements to prosecutors and in court—statements that, it turns out, could not have been used against him. The fact that McLoren might have been prosecuted on the basis of *other* evidence would have been irrelevant. The testimony clearly gave the jury a materially misleading impression on the issue that was actually pertinent to its deliberations.[8]

2. Second, McLoren answered a series of questions about his motivation for testifying and repeatedly

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[8] The Ninth Circuit's suggestion that McLoren might not have been aware of the immunity agreement, Pet.App.25a, is factually false (because McLoren was present at the meeting where the agreement was discussed, Pet.App.126a-27a) and legally irrelevant, *see Napue*, 360 U.S. at 269 (requiring reversal "when the State, although not soliciting false evidence, allows it to go uncorrected when it appears").

offered altruistic explanations (*e.g.*, to honor his dead friend or because his "grandma" told him to do it), never acknowledged receiving immunity, and asserted that it was "more important to get these guys than drugs." Pet.App.20a-27a. Those statements were all outright lies or highly misleading. By the prosecution's own admission, McLoren was unwilling to testify until he was granted immunity. Pet.App.126a-27a. The district court found McLoren's testimony false. Again, however, the Ninth Circuit held that "none of these statements are false—and certainly not perjurious." Pet.App.25a.

As even the Ninth Circuit recognized, McLoren's testimony plainly was misleading in its failure to acknowledge the immunity deal. Taken as a whole, McLoren's testimony left the jury with the false impression that McLoren was testifying for the altruistic reasons he mentioned, when in fact his testimony was a proximate result of the immunity agreement.

3. Third, McLoren twice claimed that his grandmother told him to testify even though it meant he was exposing himself to a "drug charge." Pet.App.26a. By any reasonable measure this claim was false and misleading. McLoren had use immunity at a minimum, and thus testifying or cooperating with the authorities in this case could not have led to a drug charge. The district court found this claim to be false.

The Ninth Circuit acknowledged that this was "the most colorable claim of falsity" given that it "would not have been true" for McLoren to suggest that he "could have exposed himself to liability by speaking to Semow." *Id.* Nevertheless, it reasoned, the statement theoretically could have been true at the time his

grandmother gave him the advice (which, the Ninth Circuit asserted, was not clear from the record). *Id.* It also concluded that because "McLoren's statement did not foreclose or diminish the possibility that he was granted use immunity .... [his] testimony was not false." Pet.App.27a.

This reasoning also is inconsistent with *Alcorta*. In *Alcorta*, a literal interpretation of the witness's false testimony would not have "foreclose[d] or diminish[ed] the possibility" that he was engaging in a loveless extramarital affair with the defendant's wife. *See* 355 U.S. at 30. The Ninth Circuit erred by hypothesizing scenarios in which the testimony could be literally true, rather than by focusing on the misleading impression it obviously created for the jury.

4. Finally, the Ninth Circuit declined to include D.D.A. Latin's assertion that McLoren exposed himself to "criminal liability" as part of its false evidence analysis because "[s]ummation consists of opinion, advocacy and appeals to justice" rather than the submission of evidence. Pet.App.33a n.12. That is inconsistent with *Giglio*, which treated a misleading representation by the prosecutor as a key aspect of its analysis. *See Giglio*, 405 U.S. at 152 ("In summation, the Government attorney stated, '[Taliento] received no promises that he would not be indicted.'") (alteration in original). Other courts of appeals have recognized that improper prosecutorial argument capitalizing on false testimony is relevant both to assessing whether the jury was misled and to materiality. *See, e.g.*, *DeMarco v. United States*, 928 F.2d 1074, 1077 (11th Cir. 1991) (concluding "that the prosecutor's argument to the jury capitalizing on the perjured testimony reinforced the deception of the use of false testimony

and thereby contributed to the deprivation of due process"); *United States v. Iverson*, 637 F.2d 799, 804 n.15 (D.C. Cir. 1980) ("The prosecutor not only did not at any time correct [the witness's] false testimony; he actually reiterated it in his closing argument, thereby compounding the prejudicial impact ....").

The Ninth Circuit also held that Latin's statement was not false—disregarding the district court's contrary conclusion and even the State's concession that the statement was "certainly incorrect." State's Opening Brief on Appeal at 69 n.35. The court acknowledged that Latin's statement "could have been taken to mean that McLoren exposed himself to prosecution for marijuana dealing by testifying, which, due to use immunity, would not have been true." Pet.App.30a. It even agreed that, if Latin was referring to a potential marijuana prosecution, his statement was an effort to "deceive[] the jury." *Id.* But the Ninth Circuit reasoned that Latin's "comment could also have been taken to mean that McLoren's testimony exposed him to charges of perjury if he lied on the stand," and therefore was ambiguous rather than false. Pet.App.30a-31a.

That line of reasoning is preposterous and flatly inconsistent with *Alcorta*. Immunity agreements *never* prohibit subsequent prosecution for perjury, so under the Ninth Circuit's reasoning prosecutors may claim that *every* immunized witness opens themselves up to "criminal liability" by testifying—no matter how misleading that declaration is in context. Here, Latin's statement came in the context of a discussion of the defense's use of McLoren's marijuana dealing as impeachment evidence. Latin was specifically responding to that attack and made multiple references

to McLoren's marijuana dealing in the moments before his "criminal liability" statement. That statement clearly left the jury with a seriously misleading impression, at a minimum.

5. Taking these statements as a whole, as this Court's precedents require, there can be no doubt that McLoren and the prosecution left the jury with the false impression that McLoren was risking prosecution for his marijuana dealing by testifying.

C. The Prosecution's Knowing Presentation Of Misleading Testimony Was Material And Requires Reversal

Because the Ninth Circuit held that McLoren's testimony was not "false," it did not assess the impact of that testimony under the *Napue* materiality standard. Instead, the court invented and applied a complex review framework that ignored McLoren's testimony altogether. The Ninth Circuit first assessed whether the instances of *prosecutorial misconduct* standing alone rendered the trial "fundamentally unfair" under *Darden*. It then analyzed the prosecutor's comments in combination with the non-disclosure of the immunity letter under the *Brady* materiality standard. Pet.App.31a-38a.

The Ninth Circuit's materiality analysis was fundamentally flawed. It should have asked whether McLoren's misleading statements, as reinforced by improper prosecutorial argument, "could have affected the jury's verdict"—or, in other words, whether those statements and argument were "harmless beyond a reasonable doubt," *Bagley*, 473 U.S. at 679-80 & n.9. The prosecution's knowing presentation of false testimony and argument in this case plainly satisfies that standard, and requires a new trial.

This Court has held consistently that false testimony by an essential prosecution witness is material, particularly when the testimony involves inducements to testify that are concealed from the defense and jury. In *Giglio*, for instance, this Court emphasized that the Government's case "depended almost entirely on [the witness's] testimony; without it there could have been no indictment and no evidence to carry the case to the jury." 405 U.S. at 154. The witness's credibility "was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it." *Id.* at 154-55.

So too here, the State's felony murder case depended almost entirely on McLoren's testimony. *See* Pet.App.36a ("the prosecution's case relied on McLoren's testimony"); Pet.App.47a (finding that McLoren's testimony was the only direct evidence of petitioners' intent to steal). The prosecution described the case as a credibility contest between McLoren and the conflicting evidence of intent provided by Jason Holland. *See* Pet.App.128a. To bolster its side in that credibility contest, the prosecution devoted much of its closing argument to vouching for McLoren's credibility, repeatedly praising him as "honest," asserting that "[h]e answered every question truthfully," all while hailing his altruistic motivations for testifying. *See, e.g.*, Pet.App.128a-132a.

The prosecutors were keenly aware that it would damage McLoren's credibility if the jury learned of his immunity agreement. *Supra* at 5. The defense understood that too, and repeatedly questioned McLoren about his potential exposure for dealing

marijuana. Yet the prosecution never corrected any of McLoren's statements implying he had not received immunity. To the contrary, in closing argument, the prosecution affirmatively stated that McLoren had "opened himself up to ... criminal liability," a statement which even the State now concedes was "certainly incorrect." Pet.App.131a; State's Opening Brief on Appeal at 69 n.35.

The State and the Ninth Circuit suggested that false testimony and argument about a "use immunity" agreement is of little significance because such agreements give the witness no incentive to lie. But McLoren's false statements are material because they wrongly led the jury to believe that his testimony was particularly credible because he exposed himself to potential prosecution by testifying as he did. Even if the immunity agreement itself did not give McLoren a reason to lie, that does not mean that false testimony about the agreement and the witness's motivations for testifying cannot be material. And in *Alcorta*, the witness clearly did not receive any benefit for his false testimony.

It also simply is not the case that an agreement for use immunity provides no incentive to testify falsely. As Prosecutor Semow himself explained, if McLoren provided testimony that helped convict a murderer, only a "dishonorable" "idiot" would then seek to prosecute him for marijuana dealing—even using evidence that came independently of McLoren's testimony. Pet.App.127a. McLoren thus understood that his freedom could be contingent on helping the prosecution secure a conviction in this case.

The Ninth Circuit also asserted that McLoren's (and the prosecution's) misrepresentations were not

material because "the prosecution offered the only believable theory for why the fight began in the first place, i.e., that it had been instigated by Micah's attempted robbery of McLoren's drugs." Pet.App.36a. The Ninth Circuit's reasoning ignores Jason Holland's testimony about what happened, and rests on the unsupported and absurd judicial speculation that it is simply *impossible* for a fight to "spontaneously erupt[]" between two groups of intoxicated teenage boys, unless one of the groups had the premeditated intent to rob the other. *Id.* McLoren, who testified that he was "kind of angry" just before Petitioners arrived, ER-396, might have overreacted to Micah Holland's request for marijuana. McLoren had begun working out more—lifting, training with a punching bag, and practicing a "karate kick" (ER-503-11)—and may have decided to try out his moves on the smaller Micah, given their contentious history. *See, e.g.*, Pet.App.44a. The prosecution certainly did not believe that its premeditated robbery theory was the only plausible explanation of the events. It recognized that McLoren's credibility was crucial.

The Ninth Circuit's materiality analysis is unpersuasive even on its own terms. More importantly, it applied the wrong standard and wrongly ignored much of the prejudicial testimony. Under the correct standard, these errors plainly could have influenced the jury's deliberations.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THE MAJORITY OF COURTS OF APPEALS

The Ninth Circuit's decision chooses sides with the minority position in an entrenched 7-3 circuit split that

merits review. Petitioners would have been granted relief in seven circuits.

A. The Ninth Circuit's Reasoning Conflicts With The Settled Law Of Seven Circuits

Fifth Circuit

In *United States v. Barham*, 595 F.2d 231, 239 (5th Cir. 1979), the Government put forward three witnesses who had each received promises of leniency. The first responded to the defense counsel's inquiries on cross examination in "evasive fashion," giving answers that the court found were, "to put it charitably[,] less than honest." 595 F.2d at 239-40. The second gave answers that "were not completely candid," but which "could not yet be characterized as false or deceitful." *Id.* at 240. On redirect examination, the prosecutor brought the second witness's "latent deception ... to fruition through several questions which, although perhaps asked innocently, were unfortunately quite misleading in the circumstances." *Id.* The third witness gave an answer that, while "truthful in a narrow, literal sense," had the effect of denying "much more than the truth warranted." *Id.* at 241.

Under the Ninth Circuit's erroneous "actual falsity" standard, none of these misleading statements would have implicated *Alcorta* and *Napue*. Yet the Fifth Circuit properly reversed the conviction, holding that the testimony heard by the jury, "if not outright lies, certainly conveyed the false impression that none of the three witnesses had received any promises of leniency or other considerations." *Id.* Moreover, the court faulted the prosecution for making "no attempt to correct the false evidence," and even reinforcing the deception, despite knowing that its witnesses "had

conveyed to the jury something other than the truth." *Id.* This directly contradicts the Ninth Circuit's decision, which found that the prosecutor "had no duty to clarify McLoren's answers" so long as none of them were literally false. Pet.App.27a.

Other Fifth Circuit cases confirm *Barham*'s holding. In *Blankenship v. Estelle*, 545 F.2d 510, 513 (5th Cir. 1977), the prosecution's two key witnesses testified that they were under indictment but failed to mention an alleged pretrial bargain to drop those charges in exchange for their testimony. The court reversed for an evidentiary hearing, noting that such a deal "would place this case squarely within the *Giglio* rule and entitle [petitioner] to a new trial." 545 F.2d at 513. Critically, the court found that it made no difference if the witnesses' testimony was "technically true," as "it left the erroneous impression of an impending trial and the absence of leniency as an inducement to testify." *Id.*; *see also Dupart v. United States*, 541 F.2d 1148, 1150 (5th Cir. 1976) ("[A]ssuming the allegations to be true, such a formalistic exchange of testimony[,] even though technically not perjurious, would surely be highly misleading to the jury ....").

More recently, in *Tassin v. Cain*, 482 F. Supp. 2d 764, 773 (E.D. La. 2007), *aff'd*, 517 F.3d 770 (5th Cir. 2008), the court relied on *Barham* to vacate a murder conviction when the State's lead witness testified that she faced a 99-year sentence, even though she privately expected that her testimony would result in a 10-year sentence. "Despite the technical accuracy of these statements," the court concluded, "a false impression was created in the jury" and "*Giglio* and *Napue* prohibit the State from obtaining convictions based on such false impressions." 482 F. Supp.2d at 773.

Second Circuit

The Second Circuit holds that misleading testimony can violate *Napue* even if it is "probably true." *Jenkins v. Artuz*, 294 F.3d 284, 294 (2d Cir. 2002). In *Jenkins*, the prosecutor "did not seek to correct her witness's at-best-ambiguous testimony about the existence of a plea agreement." *Id.* at 289. Instead, on redirect examination, the prosecutor asked questions that, "while eliciting technically accurate testimony, were phrased so as to re[i]nforce the false impression that no deal had been made." *Id.* at 294. In summation, the prosecutor then bolstered her witness's credibility "by falsely suggesting the absence of a deal between [the witness] and the prosecution." *Id.* The court affirmed the grant of habeas relief, remarking: "That a statement standing alone is factually correct obviously does not mean that it cannot mislead based on the natural and reasonable inferences it invites." *Id.*

Other decisions in the Second Circuit have reached a similar conclusion. *See Drake v. Portuondo*, 553 F.3d 230, 243-45 (2d Cir. 2009) (finding *Napue* violation because prosecutor "plainly crafted the question to achieve literal accuracy while conveying the false impression that [the witness's] work had been validated through publication"); *United States v. Vozzella*, 124 F.3d 389, 392-93 (2d Cir. 1997) (testimony was "so misleading as to amount to falsity").

Fourth Circuit

The Fourth Circuit likewise agrees that prosecutors cannot escape *Napue* and *Giglio* scrutiny by having their witnesses "skirt[] the edge of perjury." *Boone v. Paderick*, 541 F.2d 447, 450 (4th Cir. 1976). In *Boone*, notably similar to this case, "the prosecutor concealed an offer of favorable treatment to [the

defendant's] principal accuser." *Id.* at 448. The prosecutor then made statements "which were clearly intended to give the impression that [the witness] knew nothing about possible lenient treatment, that he testified against, rather than in aid of, his penal interest, and that his testimony in general was the product of an active conscience." *Id.* at 450. The court reversed the conviction, holding that the witness's "general denial of any promise of leniency, when coupled with the prosecutor's emphasis upon altruistic motivation, constitutes false evidence of which the prosecutor knew or should have known." *Id.*; *see also United States v. Sutton*, 542 F.2d 1239, 1243 (4th Cir. 1976) ("In short, as in [*Napue*], here the prosecution allowed a false impression to be created at trial when the truth would have directly impugned the veracity of its key witness."); *Monroe v. Angelone*, 323 F.3d 286, 314-15 (4th Cir. 2003) (citing *Sutton* and *Boone*).

D.C. Circuit

In *Iverson*, 637 F.2d at 802, the D.C. Circuit determined that a key witness testified untruthfully regarding her sentencing status. "Yet the prosecutor, who knew or should have known the actual facts, remained silent, and he did nothing to alert the Court and jury to the truth." 637 F.2d at 802-03. "[T]hat failure to correct the witness'[s] misrepresentations," the court held, "was improper and warrants a new trial." *Id.* at 803. Significantly, the court rejected the dissent's suggestion "that absent perjury there is no affirmative duty on the prosecutor to correct false testimony." *Id.* at 805 n.19. Citing the Fifth Circuit's *Barham* decision among others, the court held that "it makes no difference whether the testimony is technically perjurious or merely misleading." *Id.*

Third Circuit

In *United States v. Harris*, 498 F.2d 1164, 1168 (3d Cir.), *cert. denied*, 419 U.S. 1069 (1974), the Third Circuit found that the prosecutor "sat silently while [its witness] gave testimony on cross-examination which at least gave the court and jury an impression directly contrary to what he ultimately stated was the truth concerning his agreement with [the witness]." The court concluded that "*Giglio* and *Napue* require that the prosecutor apprise the court when he knows that his witness is giving testimony that is substantially misleading." 498 F.2d at 1169; *see also United States v. Stadtmauer*, No. 09-1575, 2010 U.S. App. LEXIS 18851, at *82-83 (3d Cir. Sept. 9, 2010) (citing *Harris*)).

First Circuit

In *United States v. Casas*, 425 F.3d 23, 44 (1st Cir. 2005), *cert. denied*, 546 U.S. 1199, *and* 547 U.S. 1061 (2006), the court found that "the representation during direct examination that no cooperation agreement existed was, at best, misleading." The court went on to "strongly condemn the prosecution's failure to correct the statement or to disclose the existence of a cooperation agreement as required by *Giglio*." 425 F.3d at 44.

Similarly, in *United States v. Bynum*, 567 F.2d 1167, 1169-70 (1st Cir. 1978), the First Circuit considered a co-conspirator's claim that he had not received any "promise of leniency" in return for testifying. The court allowed that the witness may have thought that a promise of leniency "was technically different" from the type of promise he actually received, but determined that "such a distinction would probably be lost on a jury." 567 F.2d at 1169. "In such circumstances," the court concluded,

the witness's answers "would have the effect of misleading [the jury] into believing that the government had provided no promise to induce [the witness] to testify." *Id.* (citing *Harris*, 498 F.2d at 1169).

Seventh Circuit

In *United States v. Morris*, 498 F.3d 634 (7th Cir. 2007), *cert. denied*, 553 U.S. 1065 (2008), the prosecutor "affirmatively represented to the jury several times that [the witness] would be subject to a mandatory minimum sentence of 10 years," when in fact "there was nothing immutable about the 10-year term reflected in [the witness's] plea agreement." 498 F.3d at 638-39. According to the court, the prosecutor "plainly knew it was within the government's discretion to ask the judge to impose a sentence below the normal statutory minimum," and so it was "therefore improper both to give the jury the impression that [the witness's] sentence could not go below 10 years during his examination of [the witness], and then later to argue the same thing to the jury." *Id.* at 639.

B. The Ninth Circuit's Reasoning Is Consistent With Recent Precedents From The Sixth, Eighth, And Eleventh Circuits

The Sixth, Eighth, and Eleventh Circuits initially held the majority view discussed above, but have recently shifted to a requirement of actual falsity akin to the Ninth Circuit's decision below.

Sixth Circuit

In 1974, the Sixth Circuit affirmed a grant of habeas relief under *Giglio* on the grounds "that the prosecutor deliberately misled the jury by assuring it that [the witness] had nothing to gain by giving his testimony."

Armour v. Salisbury, 492 F.2d 1032, 1037 (6th Cir. 1974). Later, the Sixth Circuit changed its standard, holding that "the defendant must show that the statement in question was 'indisputably false,' rather than merely misleading." *Byrd v. Collins*, 209 F.3d 486, 517 (6th Cir. 2000) (quoting *United States v. Lochmondy*, 890 F.2d 817, 823 (6th Cir. 1989)), *cert. denied*, 531 U.S. 1082 (2001); *accord Akrawi v. Booker*, 572 F.3d 252, 265 (6th Cir. 2009) (declining *Giglio* relief because the testimony had not been shown to be "undisputably false," even though it was misleading).

Eighth Circuit

The Eighth Circuit also started with a broad conception of what constitutes false testimony, citing *Harris*, *Sutton*, and *Boone* for the position that the *Giglio* doctrine goes beyond perjured testimony and "also encompasses situations in which the government allows materially misleading statements to go uncorrected." *United States v. McClintic*, 570 F.2d 685, 692 (8th Cir. 1978). In *McClintic*, the court ultimately affirmed the defendant's conviction, but only after finding that "the government inexcusably neglected to correct the misleading impression made by the memoranda of negotiated pleas and to fully and accurately disclose the true nature of the plea bargain." *Id.* More recently, however, the Eighth Circuit appears to agree with the Ninth Circuit that the *Napue / Giglio* line of cases does not encompass the creation of a false impression. *See Pederson v. Fabian*, 491 F.3d 816, 827-28 (8th Cir. 2007) (affirming that a statement is not false so long as it is "ambiguous and subject to multiple reasonable interpretations").

Eleventh Circuit

Finally, the Eleventh Circuit historically held that introduction of misleading evidence triggers review under *Napue*. *See United States v. Rivera Pedin*, 861 F.2d 1522, 1530 n.14 (11th Cir. 1988) ("[T]he *Napue* rule applies where testimony, 'even though technically not perjurious, would surely be highly misleading to the jury ....'") (quoting *Dupart*, 541 F.2d at 1150); *Tejada v. Dugger*, 941 F.2d 1551, 1556 (11th Cir. 1991), *cert. denied*, 502 U.S. 1105 (1992). In recent cases, however, the court appears to have adopted a requirement of absolute falsity. *See Hammond v. Hall*, 586 F.3d 1289, 1307 (11th Cir. 2009) ("Because there was no lie, there was no *Giglio* violation."); *Smith v. Sec'y, Dep't of Corr.*, 572 F.3d 1327, 1335 (11th Cir. 2009) ("Accurate statements do not violate the *Giglio* rule.").

III. THIS CASE PRESENTS ISSUES OF NATIONAL IMPORTANCE

The entrenched circuit split discussed above illustrates that cases in which prosecutors knowingly present misleading testimony—and, in particular, misleading testimony concerning whether a key cooperating witness has been given immunity—remain sadly common. This Court has staked out, and repeatedly defended, a strong rule that knowing presentation of false evidence is intolerable and almost always requires reversal. The Ninth Circuit's reasoning here—and the similar recent holdings of the Sixth, Eighth, and Eleventh Circuits—is an open invitation for prosecutors to skirt the truth in a manner that clearly misleads the jury but just barely avoids actual perjury. That rule has nothing at all to recommend it, and merits this Court's review.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX TABLE OF CONTENTS

Page

Opinion of the United States Court of Appeals for the Ninth Circuit, *Hein v. Sullivan*, 601 F.3d 897 (9th Cir. 2010) 1a

Report and Recommendation of United States Magistrate Judge of the United States District Court for the Central District of California, *Holland v. Adams*, Nos. 04-3502, 04-3407, 04-3416, 04-3491-SJO (MLG) (C.D. Cal. Apr. 3, 2007) 42a

Order of the United States District Court for the Central District of California Accepting and Adopting Findings and Recommendations of United States Magistrate Judge, *Hein v. Sullivan*, No. 04-3502-SJO (MLG) (C.D. Cal. Aug. 9, 2007) 118a

Order of the United States Court of Appeals for the Ninth Circuit Denying Rehearing, *Hein v. Sullivan*, Nos. 07-56277, 07-562788, 07-56365, 0756367 (9th Cir. July 16, 2010) 120a

28 U.S.C. § 2254(d) 122a

Letter from Jeff Semow to Mr. Sorkin regarding Michael McLoren's immunity agreement, dated July 10, 1995 [ER[1]-200] 123a

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[1] "ER" refers to the Excerpts of Record filed in the 9th Circuit.

APPENDIX TABLE OF CONTENTS—Continued

Page

Declaration of Tracy Dressner dated July 11, 2002, attaching transcript of William Gazecki's videotaped interview with Jeff Semow regarding Michael McLoren's immunity agreement [ER-249-51] 124a

Excerpts of Reporter's Trial Transcript—Prosecution Initial Summation [ER-743, 752] 128a

Excerpts of Reporter's Trial Transcript—Prosecution Rebuttal Summation [ER-778-79, 814-15, 839] 130a

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Brandon Wade HEIN, Petitioner-Appellant,

v.

William Joseph SULLIVAN, Warden of California Correctional Institution, at Tehachapi, California, Substituted for Michael G. Yarborough, Respondent-Appellee.

Tony Miliotti, Petitioner-Appellant,

v.

Jim Hall, Respondent-Appellee.

Jason Skip Holland, Petitioner-Appellant,

v.

Al Scribner, Substituted for George A. Ortiz, Respondent-Appellee.

Micah Holland, Petitioner-Appellant,

v.

Derral G. Adams, Respondent-Appellee.

Nos. 07-56277, 07-56288, 07-56365, 07-56367.

April 12, 2010

601 F.3d 897

Before ANDREW J. KLEINFELD and RICHARD C. TALLMAN, Circuit Judges, and

DAVID G. TRAGER,* District Judge:

TRAGER, District Judge:

In 1996, Brandon Hein, Micah Holland, Jason Holland[1] and Tony Miliotti, were convicted, after being tried together in California state court, of crimes relating to the 1995 attempted robbery of Michael McLoren, a small-time marijuana dealer, and the stabbing death of McLoren's friend, James Farris. All the participants were teenagers at the time of the stabbing, and Miliotti and Micah, who were juveniles at the time of trial, were tried as adults. The jury had been instructed on felony murder and found all four petitioners guilty of that crime. Jason, who admitted at trial that he stabbed Farris, was also convicted of assault with a deadly weapon. After bringing unsuccessful appeals and habeas corpus petitions in state court, petitioners filed habeas petitions in federal court, which were denied.

Before trial, the prosecution had given the lawyer for McLoren, its only eyewitness to the stabbing and a surviving victim, a letter in which it promised not to use against him anything he told the State about his marijuana dealing. Petitioners' principal challenges-suppression in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), presentation of false testimony and prosecutorial misconduct-stem from the prosecution's alleged non-disclosure of that letter to certain defense counsel.

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* The Honorable David G. Trager, United States District Judge for the Eastern District of New York, sitting by designation.

[1] To avoid confusion, we generally refer to brothers Micah and Jason Holland by their first names only.

Because, in light of the record from the two-month-long jury trial, the letter was not the decisively impeaching evidence petitioners make it out to be and attempted robbery was the only plausible theory for the instigation of the fight that culminated in Farris's death as well as McLoren's stabbing, petitioners fail to establish the prejudice required to overturn their convictions. Accordingly, to the extent the letter was not disclosed, we are satisfied its disclosure would have had little impact on the outcome of the trial. Likewise, any improper argument made by the prosecution in summation did not prejudice petitioners. Finally, petitioners' claim that McLoren testified falsely finds no basis in the record. Therefore, we affirm the district court's judgment denying habeas relief.

BACKGROUND

After a joint trial, a jury found petitioners guilty of attempted robbery, burglary and felony-murder. The prosecution's theory was that a fight between petitioners on one side and McLoren and Farris on the other had ensued after petitioners entered McLoren's grandparents' property and attempted to rob him of marijuana he kept for sale. Petitioners contended that they were on the property to buy marijuana from McLoren and that a fight had spontaneously erupted. Thus, petitioners' felony-murder convictions hinged on whether the jury believed the prosecution's theory that petitioners entered the property in order to rob McLoren of his marijuana stash rather than petitioners' theory that the encounter was an attempted drug buy that went sour.

The Attempted Robbery

(1)

Petitioners' convictions were attributable, in large

part, to the trial testimony of McLoren. McLoren, who was sixteen at the time of the stabbing, testified that he maintained a make-shift shed, which he referred to as "the fort," in the backyard of his grandparents' house in Los Angeles County. The fort was furnished with a couch, a bed and a desk. McLoren kept marijuana for sale in a drawer of his desk, which he kept locked. He also kept a television, VCR and two video game consoles in the fort, all powered by an extension cord that ran to the house. The fort was used as a place to smoke marijuana and watch movies. McLoren also sold marijuana from the fort.

McLoren testified that he spent much of the afternoon of May 22, 1995, at the fort watching movies and smoking marijuana with his girlfriend and Farris, who was fifteen at the time. McLoren's girlfriend left sometime between five and seven o'clock.

At around 7:15 p.m., McLoren and Farris were hitting a punching bag outside the fort when McLoren saw petitioners, Hein, seventeen years-old, Micah, fifteen, Jason, eighteen, and Miliotti, seventeen, jump over his grandparents' fence and into the backyard. McLoren knew petitioners from prior encounters and said to Farris: "Looks like trouble." He then called out to Micah: "What's up, Micah?"

According to McLoren, petitioners, with Micah in the lead, approached the fort without saying a word. Micah walked past McLoren, entered the fort, started pulling on the locked desk drawer and demanded the key. He was quickly followed into the fort by McLoren, who, in turn, was followed by Jason and Hein. (The time between McLoren's entrance and Jason and Hein's entrance was estimated variously on direct to be three, five and ten seconds.) Micah then

shouted at McLoren: "Give me the keys, ese. You want shit with the Gumbys, ese?" McLoren understood "Gumbys" to be the name of a gang and "ese" to be a Mexican slang term "used before a fight ensues."

Micah, Jason and Hein then began punching McLoren. McLoren put his head down, and Micah, Jason and Hein punched him about ten times. Farris then entered. McLoren managed to place Micah into a headlock. McLoren proceeded to elbow Micah in the neck and back of the head. Seeing his brother being elbowed, Jason ran at McLoren, who kicked Jason in the nose. Someone then placed McLoren into a headlock and he felt himself being stabbed. He was stabbed three more times and thrown against the wall of the fort. McLoren, lying prone on the ground, looked up and saw Hein punching Farris, who was sitting on the couch.

McLoren then got up and ran to his grandparents' house. He was followed by Farris who reached the house immediately after. McLoren's mother was inside and asked what happened. McLoren told her: "They were trying to steal my stuff, and they stabbed us."

Farris collapsed on a table. He was still breathing when the paramedics arrived. After the paramedics attempted to revive Farris, McLoren heard one of them say: "He stopped breathing." Farris was pronounced dead at McLoren's house. He died of a stab wound to the main chamber of the heart. Los Angeles County Sheriff's deputies also responded and commenced the homicide investigation. All four members of the Holland group were ultimately charged.

(2)

Jason Holland testified in the defense's case-in-chief

and admitted stabbing both Farris and McLoren. On May 22, Jason, after drinking alcohol and smoking marijuana for several hours, drove with petitioners and his friend Chris Velardo in Velardo's truck to McLoren's house. When they arrived, petitioners exited the truck while Velardo remained in the driver's seat. Jason asked Velardo why they were there, to which Velardo replied: "We're going to get some weed." Jason took that to mean that they were going to buy some marijuana. Resolution of the true purpose of seeing McLoren was the key issue the jury had to resolve.

When Jason jumped the fence, Micah was already in the yard about twenty feet ahead of him. As Micah approached the fort, Jason heard McLoren say: "What's up Micah?" Micah said nothing and waved. Micah and McLoren then entered the fort and Farris stood in the doorway facing out.

Jason could see inside the fort and observed Micah and McLoren facing each other about a foot apart. Micah and McLoren then dropped their heads and started fighting. Jason and Hein entered the fort and joined the fight.

Jason testified that he stabbed Farris twice after Farris spun him around. He also testified that the other petitioners did not believe that he had stabbed McLoren and Farris until he showed them the bloody knife as they fled the crime scene.

(3)

Petitioners point to a number of occasions where McLoren provided inconsistent information to the police about the object of the alleged attempted robbery. For instance, before McLoren was taken to the hospital on the night of the stabbing, he was

questioned briefly by the police and told them that petitioners had come for his electronic equipment.

Then, four days after the stabbing, in a recorded interview, McLoren was questioned at the hospital by Sheriff's Homicide Detectives Robert Tauson and William Neumann. McLoren denied ever having sold marijuana even though he received assurances from Detective Tauson that the authorities had no interest in prosecuting him. However, McLoren did admit keeping some marijuana for personal use. Consistent with this version of events, he initially told the detectives on May 26, 1995, that he thought petitioners had come for his video games, adding that it was his opinion that petitioners were "just bored" and were "going to come up on a bunch of stuff," such as "a free T.V., VCR ... and maybe even like a little bit of marijuana to go with."

McLoren did not admit selling marijuana until he met with Deputy District Attorney Jeffrey Semow ("DDA Semow" or "Semow") on July 10, 1995. In an *in camera, ex parte* pretrial hearing, Semow recalled meeting with McLoren's lawyer, Ellery Sorkin, on that day. Semow wanted to "see if Mr. McLoren would testify without transactional immunity." Sorkin believed that Semow was building a marijuana prosecution against McLoren. To allay Sorkin's fears, Semow drafted a letter ("July 10 letter" or "immunity letter") to Sorkin promising that "nothing [McLoren] tells me or the investigating officers about marijuana will be used in any way against him."

The Wallet Theft

About an hour before the stabbing, Velardo drove petitioners to Gates Park in nearby Calabasas where they intended to get drunk. As they were pulling into

the parking lot, a wallet sitting in a van caught Jason's eye. The van belonged to Alyce Moulder, who was playing with her children in the park. Jason opened the door of the unlocked van, took the wallet and closed the door, which Moulder witnessed. Jason jumped into the bed of the truck and told Velardo to drive.

Velardo then sped out of the parking lot as Moulder yelled: "Hey don't take my wallet. I don't have any money in it. I need my driver's license." Jason rifled through the wallet, which indeed held no money, and threw it onto the road.

After about five minutes, Moulder collected her children, got into her van and followed Velardo's truck. She found the truck parked at a shopping mall soon after. She pulled up behind the truck, parked and walked over to it. Only Velardo was in the truck at that time. Moulder confronted him, grabbing his collar and demanding her wallet. He said he did not have her wallet.

While Moulder was still arguing with Velardo, petitioners approached them from across the parking lot. Moulder saw that Hein was holding something in his hand that she recognized as a wheel locking device known as "The Club." Petitioners threatened Moulder, screaming at her to leave. She slowly backed up toward the driver's side door of her van and entered it. As she did so, Hein spat on her windshield. Moulder then pulled away, and Micah threw something which hit her van.

Procedural History

Petitioners were convicted of burglary, attempted robbery and felony murder with a special

circumstance[2] and appealed. The California Court of Appeals denied all of petitioners' claims except Miliotti's claim that insufficient evidence supported the special circumstance finding against him. *Hein*, 104 Cal.Rptr.2d at 92. The court accordingly reduced his murder conviction to second degree. *Id.* at 95. He was resentenced to fifteen years to life plus four years.

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[2] Section 190.2(a) of the California Penal Code provides a penalty of death or life imprisonment for defendants who are found guilty of first-degree murder if certain special circumstances are found to be true beyond a reasonable doubt by the finder of fact. One of the special circumstances is that the murder was committed during the commission of one of the felonies enumerated in section 190.2(a)(17), which include robbery and burglary. Section 190.2(d) authorizes the death penalty or life imprisonment for any defendant other than the actual killer who "with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of" one of those felonies. In petitioners' trial, the jury was instructed that:

> [I]t could only find the special circumstance to be true if they found beyond a reasonable doubt (1) that the defendant with the intent to kill aided and abetted any actor in the commission of the first degree murder; *or*, (2) that the defendant with reckless indifference to human life *and* as a major participant aided "or" abetted in the commission of the attempted robbery and burglary which resulted in the death of Farris.

People v. Hein, 104 Cal.Rptr.2d 85, 91-92 (Cal.Ct.App.2001). The jury found the special circumstance to be true beyond a reasonable doubt. *Id.* at 87. The record is silent as to which condition of the special circumstance the jury found to be true. However, it appears that the jury found true—and the California Court of Appeals dwelled on—the second condition (i.e., that petitioners "with reckless indifference to human life" and as "major participant[s]" aided or abetted in the commission of the attempted robbery and burglary) at least as to Micah, Hein and Miliotti.

Regarding petitioners' claims of prosecutorial misconduct, the court found that the prosecution "contravened the trial court order excluding gang evidence" and made statements which were "unnecessary, professionally questionable and highly risky." But the court held that reversal was not necessary because a better result would not have been reasonably probable had the comments not been made.

Since petitioners claim that they did not find the July 10 letter until after their direct appeal had concluded, their habeas petitions to the California Supreme Court raised the issues relating to the letter for the first time. The court summarily denied the petitions. Petitioners filed timely petitions for habeas corpus in federal court pursuant to 28 U.S.C. § 2254. The magistrate judge's 78-page report and recommendation, which the district court adopted, found that none of the claims raised warranted habeas relief. Micah and Hein are currently serving prison sentences of twenty-nine years to life,[3] Miliotti is serving a sentence of nineteen years to life and Jason is serving a sentence of life without parole.

DISCUSSION

Petitioners raise five claims on appeal: (1) suppression of evidence in violation of *Brady*, (2) presentation of false testimony, (3) prosecutorial misconduct, (4) cumulative error and (5) ineffective assistance of counsel. Their federal due process claims arising out of their California state prosecution are subject to the stringent standard of review provided by

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[3] After briefing was completed, Hein's murder sentence was commuted from life without parole to a term of twenty-five years to life. His total custodial sentence is now twenty-nine years to life.

the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254.

We review a district court's decision to deny habeas corpus de novo and its findings of fact for clear error. *Richter v. Hickman*, 578 F.3d 944, 951 (9th Cir.2009) (*en banc*), *cert. granted sub nom. Harrington v. Richter*, 559 U.S. ----, 130 S.Ct. 1506, 176 L.Ed.2d 108 (2010). Where, as here, "no state court has explained its reasoning on a particular claim, we conduct an independent review of the record to determine whether the state court's decision was objectively unreasonable." *Richter*, 578 F.3d at 951 (internal citation and quotation marks omitted).

(1)

Due Process Violations: *Brady*, False Evidence and Prosecutorial Misconduct

Three of petitioners' claims—*Brady*, false evidence and prosecutorial misconduct—are closely related in that they all stem principally from the July 10 letter. To wit, petitioners contend that if the prosecution had not committed a *Brady* violation as to the July 10 letter, it would not have been able to present false evidence concerning McLoren's immunity, or, in the alternative, petitioners would have been able to impeach McLoren with the letter once he gave false testimony. Similarly, if petitioners possessed the letter, they claim, the prosecution would not have been able to make certain improper arguments in summation regarding McLoren's criminal liability without defense counsel pointing out their impropriety. In sum, petitioners argue that, when viewed together with McLoren's challenged testimony and the prosecution's improper summation, the suppression of the letter affected their convictions by rendering the trial unfair.

We discuss *Brady*, false evidence and prosecutorial misconduct challenges individually to determine, respectively, whether the prosecution failed to disclose the July 10 letter, presented false evidence or made improper argument in summation. Although we find that the prosecution did not present false evidence, we agree with petitioners that the prosecution failed to disclose the letter to Jason and Hein and made improper comments in summation. Because petitioners' *Brady* and prosecutorial misconduct claims require similar analyses for evaluating prejudice[4] and encompass overlapping considerations, we analyze their effect on petitioners' convictions collectively and conclude that, to the extent the prosecution committed error, it did not prejudice petitioners.

a. *Brady* Violation

i. Applicable Law

Hein, Jason and Micah argue that the prosecution's failure to disclose favorable evidence, including McLoren's immunity letter, constituted a *Brady*

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[4] Although the tests for evaluating the prejudicial impact of these violations each use a distinct formulation, they both examine the fundamental fairness of the proceeding. A finding of prejudice, thus, requires that the conduct have some impact on the outcome of the proceeding—i.e., a reasonable probability that the result of the proceeding would have been different or that it so infected the trial with unfairness as to make the resulting conviction a denial of due process. *See Kyles v. Whitley*, 514 U.S. 419, 436, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). This means that we cannot review each instance of non-disclosure or prosecutorial misconduct in isolation, but rather must view them collectively in light of the entire record. *Kyles*, 514 U.S. at 436, 115 S.Ct. 1555; *Darden v. Wainwright*, 477 U.S. 168, 182, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986).

violation.[5] "The government violates its constitutional duty to disclose material exculpatory evidence where (1) the evidence in question is favorable to the accused in that it is exculpatory or impeachment evidence, (2) the government willfully or inadvertently suppresses this evidence, and (3) prejudice ensues from the suppression (i.e., the evidence is 'material')." *Silva v. Brown*, 416 F.3d 980, 985 (9th Cir.2005). Suppressed evidence must be considered "collectively, not item by item," *Kyles*, 514 U.S. at 436, 115 S.Ct. 1555, and is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different,"

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[5] Petitioners also allege that the prosecution failed to turn over another piece of favorable evidence. Detective Tauson took a statement from a friend of Velardo's, Katren Anderson, who signed the statement. A copy of the statement was turned over to petitioners in which Anderson said that Velardo had told her that, on the day of the stabbing, he and petitioners were going to "get some bud." However, petitioners speculate that another version of the statement existed which indicated that Velardo had said they intended to "buy some bud"; this alleged, other statement was never found. Petitioners' argument appears to be based on a misunderstanding, for it is probable that no separate version of the statement existed. Petitioners rely on the transcript of an *in camera, ex parte* hearing at which Detective Tauson discussed the statement he took from Anderson. At the hearing, Tauson told the court that Anderson said: "[T]hey were going to buy some bud." However, it is apparent that Tauson was paraphrasing the very statement the prosecution disclosed to petitioners but said "buy" instead of "get." The fact that the statement disclosed to petitioners and the one described by Detective Tauson in the *in camera* hearing both bore Anderson's signature leads us to believe that the statements were one and the same. In any event, although the defense had Anderson's statement through discovery, they neither called her as a witness nor cross-examined Tauson regarding her statement.

United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). "A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.' " *Kyles*, 514 U.S. at 434, 115 S.Ct. 1555 (quoting *Bagley*, 473 U.S. at 678, 105 S.Ct. 3375).

The district court found that petitioners had satisfied the first two *Brady* factors (i.e., that the evidence was favorable to petitioners and that the State had suppressed it). However, it found that petitioners had not satisfied the third (i.e., that the suppressed evidence was material).

ii. Whether the Prosecution Suppressed the Letter

At a juvenile fitness hearing held on July 24, 1995, and attended by Micah, Miliotti and Velardo, DDA Semow, responding to a request for discovery, orally disclosed the substance of the July 10 letter:

> There is no immunity agreement for Mr. McLoren, other than I promised him in writing that nothing he said in this case about Marijuana, [sic] would be used as evidence against him. That is it.

Counsel for Miliotti and Micah, as well as Velardo, were present. (Velardo pled guilty before trial.) Curt Leftwich, Miliotti's counsel, was the only attorney present at this hearing to also represent his client at trial. Leftwich did not cross-examine McLoren regarding his use immunity in the subsequent superior court jury trial.

Semow also apparently mentioned the letter later at a pre-trial discovery hearing held on September 15, 1995, at which all trial counsel were present:

> Those will be available at 1:30: A July 10 letter from the district attorney [to McLoren's counsel]; an August 11 letter consisting of two pages; what appears to be a misdemeanor complaint, 95M00754, attached documents, a police report. A supplementary report bearing the number 495-00136-2222-072; and another complaint report bearing a D.R. number of 195-06108-2223-189. So that can be disclosed to counsel.

Although all counsel attended this hearing, petitioners, with the exception of Miliotti, claim their counsel did not receive the July 10 letter.

In early 2002, Miliotti's habeas counsel found a copy of the July 10 letter and the transcript of the juvenile fitness hearing in the file Leftwich gave to Miliotti's family after the trial and sent the transcript and a copy of the letter to Leftwich. In a declaration dated July 10, 2002, Leftwich stated that he did not recall ever having seen the letter. But he stated that the transcript of the juvenile fitness hearing refreshed his recollection that he had learned of the letter's existence when Miliotti's case was in juvenile court.

Trial counsel for Hein and Micah also submitted declarations, in which they claimed not to recall receiving the letter. Jill Lansing, Hein's trial counsel, submitted a declaration in which she stated that she had no recollection of receiving the letter or having been told of any immunity agreement. She attached three discovery receipts from 1995, two of which predate the September 15, 1995, pretrial discovery hearing. None of the three referenced the July 10 letter. The receipts also do not reflect that counsel received any of the other material mentioned by

Semow at that hearing.[6] Notably, petitioners do not claim that the prosecution failed to disclose those other documents.

James Sussman represented Micah at trial but not at the juvenile fitness hearing. In a signed declaration, Sussman stated that he was unaware of the July 10 letter. Sussman prepared a writ challenging the findings of the juvenile court, but this was before the transcript of the July 24 juvenile fitness hearing had been made available. Although Semow had disclosed the entire contents of the letter on the record at that hearing, and Sussman admitted that he later reviewed the transcript for impeachment purposes after the writ was denied, he "did not 'pay attention to the discussions or arguments of counsel.'"

In the court below, the State did not object to the magistrate judge's factual finding that none of the petitioners, with the exception of Miliotti, received the July 10 letter or were apprised of its existence. However, the State now correctly argues that the prosecution fulfilled its *Brady* obligation to Micah by disclosing the existence of the July 10 letter to Micah's counsel at the juvenile fitness hearing.

The State concedes that Hein and Jason meet the second *Brady* element. The magistrate judge did not dwell on this element of the *Brady* test, finding that the agreement was suppressed as to Micah as well as to

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[6] Because the record reflects only oral disclosure of the letter at the juvenile fitness hearing, Miliotti's counsel, Leftwich, probably did not receive a copy of the letter then but rather after the September 15, 1995, discovery hearing. It, thus, seems odd that, despite Semow's explicit statement that counsel should pick the letter up at 1:30 the day after the discovery hearing, only Leftwich appears to have actually received it.

Jason and Hein. After citing *Banks v. Dretke*, 540 U.S. 668, 695-96, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004), for the proposition that the Supreme Court's "decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed," the magistrate judge determined that the immunity deal was not disclosed because "[t]he existence of the letter was not made clear to trial counsel." *Holland v. Adams*, No. CV-04-3407-SJO(MLG), slip op. at 20 (C.D. Cal. filed Apr. 3, 2007).

Banks does not support the magistrate judge's finding as to Micah. Semow disclosed the July 10 letter on the record at the juvenile fitness hearing attended by Micah, Miliotti and Velardo. Even though Sussman, Micah's trial counsel, was not present at that hearing, he read the transcript, explaining that he did not "pay attention to the discussions or arguments of counsel." Thus, the record supports a finding that Micah's failure to discover the July 10 letter was the result of his defense counsel's carelessness, rather than the prosecution's alleged misconduct. In reality, Micah is seeking to advance an ineffective assistance of counsel claim masquerading as a *Brady* claim. Micah is no doubt trying to cast a patina of prosecutorial misconduct on his counsel's failure to follow up on Semow's disclosure at the juvenile fitness hearing.[7]

As to Jason and Hein, the record, as it stands, supports the conclusion that disclosure was not made to them although that non-disclosure, if it occurred, was likely inadvertent. At a pretrial discovery

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[7] We also note that it is unusual that Micah's counsel at the juvenile fitness hearing did not notify Sussman of the immunity letter.

hearing, attended by all trial counsel, Semow mentioned that "[a] July 10 letter from the district attorney [to McLoren's counsel]"—presumably, the immunity letter—would be available "at 1:30" the next day. However, it was apparently not included in the materials disclosed by the prosecution. In addition, Jason and Hein did not participate in the juvenile fitness hearing, and the record is silent as to whether transcripts of that hearing were made available to them. Jason and Hein, therefore, satisfy the second *Brady* element. Before turning to the materiality of the non-disclosure, we consider whether the prosecution presented false evidence or made improper arguments in summation.

b. False Evidence

Petitioners contend that the prosecution presented false evidence and failed to correct false testimony in violation of the Supreme Court's decision in *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). To prevail on a *Napue* claim, "the petitioner must show that (1) the testimony (or evidence) was actually false, (2) the prosecution knew or should have known that the testimony [or evidence] was actually false, and (3) that the false testimony [or evidence] was material." *United States v. Zuno-Arce*, 339 F.3d 886, 889 (9th Cir.2003). False evidence is material "if there is any reasonable likelihood that the false [evidence] could have affected the judgment of the jury." *Bagley*, 473 U.S. at 678, 105 S.Ct. 3375 (internal citation and quotation marks omitted). We find that McLoren did not testify falsely, and, as such, his statements do not factor into the materiality analysis which follows our discussion of prosecutorial misconduct.

There are two parts to petitioners' claim. First,

that the testimony of the State's principal witness, McLoren, was false. Second, the manner in which Deputy District Attorney Michael Latin ("Latin" or "DDA Latin"), who shared trial duties with Semow, questioned McLoren was misleading and could be characterized as presenting false evidence. Regarding Latin's line of questioning, petitioners especially take issue with his failure to specifically ask McLoren about the July 10 letter.

As to McLoren's testimony, although a few of McLoren's statements at trial were incomplete, the critical point of McLoren's testimony, to wit, that he could still be prosecuted for marijuana possession or sale, was true. To the extent that McLoren failed to mention the July 10 letter, his testimony, viewed in its entirety, conveyed to the jury an accurate picture of his legal situation (i.e., that, although he would probably not be prosecuted, he was not given transactional immunity). Similarly, *Napue* imposed no duty on Latin to clarify McLoren's answers to open-ended questions about his willingness to be a witness or to specifically question him about the July 10 letter.

On appeal, as they did below, petitioners highlight seven statements of McLoren that they claim were false.[8] Because McLoren was given only use immunity

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[8] The district court, in its unpublished opinion adopting the magistrate judge's report and recommendation, held that certain statements made by McLoren were false (but immaterial), but it is unclear what, exactly, the magistrate judge found false. First, the magistrate judge set forth the seven statements that petitioners challenged, then found that McLoren's intimations that he did not receive immunity were "clearly false." This suggests that the magistrate judge found false a number of instances where McLoren cited motivations to testify other than use immunity. *Holland*, No. CV-04-3407-SJO(MLG), slip op. at 36. Yet, to

and was never specifically asked whether his trial testimony or the statements he gave to the authorities after July 10, 1995, could have been used against him, none of these statements were false.

According to petitioners, McLoren testified falsely by asserting that: (1) he still faced potential prosecution and (2) he was willing to testify even though some of his testimony would incriminate him.

First, on cross by Lansing, Hein's trial counsel, McLoren testified about what Detectives Tauson and Neumann told him about their intentions to prosecute him:

> [Lansing]: And at that time they basically told you that they weren't going to prosecute you if you admitted selling, if you

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support his falsity determination, the magistrate judge cited only two pages of the transcript which contained two statements petitioners argued were false: that McLoren believed that what he told Detectives Tauson and Neumann could be used against him and that he received no assurances about prosecution from his attorney. For many of the reasons discussed *infra*, the magistrate judge's finding of falsity on these two statements is unsustainable; McLoren's interview with Detectives Tauson and Neumann in which the detectives assured him that he was not the priority for prosecution in a robbery-murder case predated the July 10 letter which granted McLoren immunity, and, since McLoren was given only use immunity, he was still subject to prosecution.

The magistrate judge then concluded that McLoren's "general denial of any immunity agreement, when coupled with the prosecutor's emphasis upon his altruistic motivation for testifying, can be characterized for purposes of this analysis as false evidence." *Id.* at 37. Assuming the magistrate judge found falsity throughout the other five statements petitioners challenged, his finding is incorrect. McLoren was asked why he decided to be candid with Semow, not whether his post-immunity statements could have been used against him. His answers thus do not amount to "general denial [s]" of immunity.

admitted-

[McLoren]: They said they didn't have an interest in prosecuting me.

[Lansing]: And what did you take that to mean?

[McLoren]: That I wasn't the priority.

[Lansing]: That you wouldn't be prosecuted; is that right?

[McLoren]: Not that I wouldn't be, that I probably wouldn't be. They reserved the option.

[Lansing]: But they suggested to you that that probably wasn't going to happen; is that correct?

[McLoren]: Yes.

Lansing revisited the issue on re-cross:

[Lansing]: Was it your state of mind that the things you told Detective Neumann and Detective Tauson would not be used against you?

[McLoren]: No.

[Lansing]: You hired a lawyer; is that correct?

[McLoren]: Yes.

....

[Lansing]: And did that lawyer give you any assurances in terms of whether you would be prosecuted or not?

[McLoren]: No, not really.

[Lansing]: And have you been prosecuted?

[McLoren]: No.

As an initial matter, McLoren's testimony regarding his understanding that his statements to

Detectives Tauson and Neumann could have been used against him was clearly not false. Because McLoren had not been given any immunity at the time of the interview with the detectives on May 26, 1995, this question is irrelevant to the issue of whether he gave false testimony about the July 10 letter.

Next, McLoren's testimony about whether he faced potential prosecution was not false because he was given only use immunity. The plain language of the July 10 letter supports this conclusion. The agreement explicitly promised McLoren that "nothing he tells [Semow] or the investigating officers about marijuana will be used in any way against him."[9] Although McLoren understood and admitted at trial that charges for marijuana dealing were unlikely, the prosecution did not promise that it would never prosecute McLoren

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[9] Despite the plain language of the July 10 letter, petitioners argue that McLoren actually received transactional immunity because the California statute regarding immunity did not recognize use immunity until it was amended in 1996. The magistrate judge declined to address this argument.

Petitioners appear to be mistaken that use immunity was not recognized before 1996 in California. *See People v. Badgett*, 10 Cal.4th 330, 363, 41 Cal.Rptr.2d 635, 895 P.2d 877 (1995) (finding that trial testimony given pursuant to an agreement granting use immunity was not coerced). Furthermore, the statute they rely on, section 1324 of the California Penal Code, addresses only immunity for judicially compelled testimony. *See Griego v. Superior Court*, 80 Cal.App.4th 568, 95 Cal.Rptr.2d 351, 354 (2000) (finding that section 1324 applies only when a witness is judicially compelled to testify in "felony proceedings or investigations before the court or the grand jury"). We do not read *People v. Brunner*, 32 Cal.App.3d 908, 108 Cal.Rptr. 501 (1973), as broadly as petitioners do for the contrary position. Therefore, it appears that McLoren was, in fact, granted use immunity and still could have been prosecuted. In any event, we are discussing McLoren's understanding and not the state of the law.

for it. Therefore, McLoren accurately testified that the State "reserved the option" to prosecute him and there is no basis for saying that he was lying when he testified that his lawyer never assured that he would not be prosecuted.

Petitioners next allege that McLoren's testimony citing altruistic reasons for being candid with DDA Semow was false. Several times, on direct and redirect, McLoren was asked, with varying specificity, what had spurred him to be more forthcoming with DDA Semow than when initially questioned by Detectives Tauson and Neumann.

On direct examination, McLoren testified that he understood, from representations made by Detective Tauson at the hospital, that the State did not want to prosecute him for marijuana. McLoren was then asked:

> [Latin]: Since that initial interview with Detectives Neumann and Tauson, when questioned by either law enforcement officers or district attorneys, have you ever made any effort to hide the fact that you possessed or sold marijuana?
>
> [McLoren]: No.
>
> ....
>
> [Latin]: Are there any other reasons other than what Detective Tauson told you at the hospital that caused you to no longer want to hide the fact that you had marijuana?
>
> ....
>
> [McLoren]: Yes. My grandma told me just to take

the drug charge and just bust them.

Later, while McLoren was still on direct, the following exchange occurred:

[Latin]: As you sit here and testify in this court, do you feel inhibited or deterred in any way from talking about your prior dealings with marijuana?

....

[McLoren]: No. I feel fine talking about it.

[Latin]: Why? Can you explain why?

[McLoren]: Because it is something that I have to do.

[Latin]: Why?

[McLoren]: Because I want to get these guys that stabbed me and killed my best friend.

Then, on redirect, after he was asked why he felt ready to talk to the authorities about marijuana, the following exchange occurred:

[Latin]: What brought that about?

[McLoren]: My lawyer told me I wasn't going to be able to get these guys until I tell the whole truth.

[Latin]: Who did you talk to first ... ?

[McLoren]: Jeff Semow

....

[Latin]: You didn't know for sure whether you could trust Semow?

[McLoren]: Yes.

Finally, while still on redirect, McLoren testified:

[Latin]: Do you still feel uncomfortable talking

about [your involvement with marijuana]?

[McLoren]: Somewhat.

[Latin]: Why are you talking about it anyhow?

[McLoren]: Because it's more important to get these guys than drugs.

Contrary to petitioners' contentions, none of these statements are false—and certainly not perjurious. McLoren was asked a series of open-ended questions about why he decided to be forthcoming on and after July 10, 1995 (e.g., "[What reasons] other than what Detective Tauson told you at the hospital [caused you to come forward]?"; "Can you explain why [you decided to come forward]?"; "What brought that about?"; "Why are you talking about it anyhow?"). None of these questions specifically addressed immunity, and McLoren's failure to mention use immunity cannot be described as false. Assuming that the grant of use immunity was one reason McLoren decided to speak to Semow, he never denied receiving it. Instead, he listed alternative reasons for his willingness to be a witness, none of which are facially false. Therefore, even if McLoren's failure to mention that use immunity played a role in his decision is viewed with some skepticism, petitioners fail to demonstrate its falsity.

Moreover, because the July 10 letter was addressed to Sorkin, McLoren's lawyer, and not to McLoren, and McLoren's awareness of it was not established by the state or district courts, we do not assume McLoren knew of the letter's existence.[10] Although it is possible

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[10] Although immunity agreements are often signed by the person being granted immunity, McLoren did not sign the July 10 letter.

that Sorkin informed McLoren about the gist of the letter, the record is silent on exactly what, if anything, was communicated to McLoren.[11]

Arguably, the most colorable claim of falsity concerns McLoren's statement that his grandmother told him "just to take the drug charge and just bust" petitioners, but this claim fails as well. Petitioners do not contend that McLoren's grandmother never offered this advice. Rather, they appear to take issue with McLoren's testimony because, according to petitioners, it suggested that McLoren could have exposed himself to liability by speaking to Semow, which would not have been true. A broader look at the exchange in which the statement appeared is instructive. McLoren was asked what, other than Detective Tauson's assurance, "caused [him] to no longer want to hide the fact that [he] had marijuana." The question is vague as to time. Thus, if McLoren's grandmother offered the advice before July 10, 1995, McLoren could still have been risking criminal liability. But even assuming the statement was made after July 10, McLoren's answer was still not false because, as noted earlier, his

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[11] Although *Napue* prohibits the presentation of false evidence regardless of whether the witness is aware of its falsity, the testimony must still be actually false. *See Hayes v. Brown*, 399 F.3d 972, 980-82 (9th Cir.2005) (*en banc*). In *Hayes*, the witness testified that he was still subject to criminal charges even though the prosecutor had made a secret deal with the witness's attorney to dismiss the charges and had instructed the attorney not to notify the witness. *Id.* at 980. Sitting *en banc*, we held that, under those circumstances, the prosecution had presented false evidence. *Id.* at 981. Here, by contrast, McLoren was asked why he was willing to testify—a matter that depended exclusively on his personal knowledge—not whether he had received use immunity.

understanding as to the existence of the July 10 letter has not been established. Moreover, McLoren's statement did not foreclose or diminish the possibility that he was granted use immunity. Thus, McLoren's testimony was not false.

Finally, petitioners interpret McLoren's statement that it was "more important to get these guys than drugs" to mean that he was willing to risk prosecution for marijuana crimes if it meant bringing petitioners to justice. However, in the context of McLoren's testimony about Detective Tauson's representation, a more plausible interpretation of McLoren's answer is that McLoren was stating that he was testifying at trial because the *prosecution* was concerned only about the murder-and did not care about his relatively minor drug crimes. This interpretation comports with McLoren's testimony that he was told that he was not a priority.

Turning to Latin's examination, neither his questions nor his failure to expand upon McLoren's answers were improper and may not have even been deliberate (at least in the case of his direct examination). As none of McLoren's answers to Latin's open-ended questions were false, Latin had no duty to clarify McLoren's answers or to question McLoren specifically about the use immunity he received. Moreover, since Latin had reason to believe that the letter was in the hands of the defense (and clearly was in the case of Miliotti), he might well have expected defense counsel to raise use immunity on cross if they thought it appropriate. Accordingly, we reject petitioners' claim that the prosecution knowingly presented false evidence.

c. Prosecutorial Misconduct

Petitioners' final related claim is that the prosecution made statements in summation that violated due process. In evaluating allegations of prosecutorial misconduct, we consider whether the prosecution's actions "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden*, 477 U.S. at 181, 106 S.Ct. 2464 (internal quotation marks omitted) (quoting *Donnelly*, 416 U.S. at 643, 94 S.Ct. 1868). In determining whether a comment rendered a trial constitutionally unfair, factors we may consider are whether the comment misstated the evidence, whether the judge admonished the jury to disregard the comment, whether the comment was invited by defense counsel in its summation, whether defense counsel had an adequate opportunity to rebut the comment, the prominence of the comment in the context of the entire trial and the weight of the evidence. *See Darden*, 477 U.S. at 182, 106 S.Ct. 2464.

There were a number of instances of improper argument during the prosecution's summation, some of which were addressed by the trial court and by the California Court of Appeals.

First, the prosecution vouched for McLoren's credibility. After describing McLoren as a "very powerful and credible witness," DDA Semow told the jury on opening summation:

> [H]e was painfully honest. He answered every question truthfully, no matter how much it cost him in terms of pain, discomfort, embarrassment and humiliation. He is not a model teenager but the model of a perfect witness.

DDA Latin continued on surrebuttal:

> Think about the way you felt while you [sic] he testified. Didn't you know in your heart he was telling the truth? Didn't you? ... Think about how honest he was about some very, very painful things in his life, some things that were embarrassing, some things that hold himself out to the public as not a very good person. He was so honest about it. That's the kind of integrity that our system would like to see.

Next, Latin impugned the character of petitioners' defense counsel. After claiming that he did not "appreciate cheap lawyer tricks," Latin argued:

> [O]ne side presented a very clear and pure picture of what happened, and the other side did some very dirty things, dishonest. The defense in this case was dishonest.

Latin also argued that defense counsel pressured a defense witness, Jason Stout, to change his testimony so that it was more favorable to petitioners.

Finally, the prosecution made improper comments about petitioners themselves. For instance, the prosecution compared them to "a pack of wolves" when they stole Moulder's wallet, called Micah "a little punk" and addressed Hein directly, saying: "What a tough guy[] you are."

The trial judge sustained objections to, among other things, the prosecution's accusations of dishonesty and allegations of pressuring Stout. The judge also characterized Latin's accusation of dishonesty as "very close ... to misconduct" and instructed the jury that there was no evidence that any of the lawyers in the case committed any wrongdoing. (Defense counsel did not object to a few of the statements petitioners now challenge, including Semow's vouching for McLoren

and Latin's calling Micah "a little punk.") Several times during summation the judge made generalized instructions that argument was not evidence.

The statement we find most problematic was not addressed by the state courts. On surrebuttal summation, Latin told the jury:

> [McLoren] wasn't like Jason Holland that told the truth that he wanted to tell, that he chose to tell. He understood that if you are going to be believed you better be prepared to come in here and open up your life no matter whether the questions seem relevant to what happened or not. And many of these questions probably didn't seem relevant. They looked like they had nothing to do with anything, but he answered them. And he opened himself up to embarrassment, scorn, ridicule, contempt and criminal liability, but he did it because he understood that that is what it takes to tell the truth and be believed.

This comment could have been taken to mean that McLoren exposed himself to prosecution for marijuana dealing by testifying, which, due to use immunity, would not have been true. However, the comment could also have been taken to mean that McLoren's testimony exposed him to charges of perjury if he lied on the stand. On appeal, the State concedes that the statement was incorrect. But it is hard to accept that the trial judge, who had made a number of conscientious evidentiary rulings and timely admonitions throughout summation, remained idle while the prosecution presumably deceived the jury, even though the other rulings had been prompted by defense counsel. It is probable that the judge found the

statement ambiguous as well.

d. Prejudice Resulting from the Brady Violation and Prosecutorial Misconduct

Accepting that the prosecutors' comments in summation were improper and that they failed to disclose the July 10 letter to Jason and Hein, we next consider whether the prosecution's conduct prejudiced petitioners. Because we are satisfied that the trial was fundamentally fair and there was no reasonable probability that the letter would have affected the verdict, we reject both petitioners' *Brady* and prosecutorial misconduct claims.

It is unclear whether we should employ *Brady*'s prejudice standard to evaluate the cumulative effect of the prosecutorial misconduct and the non-disclosure. Although this circuit has never explicitly used the "reasonable probability" formulation found in the *Brady* line of cases to analyze alleged prosecutorial misconduct, a number of circuits have concluded that prosecutorial misconduct lends itself to that standard. *E.g., Styron v. Johnson*, 262 F.3d 438, 454 (5th Cir.2001); *Jones v. Gibson*, 206 F.3d 946, 959 (10th Cir.2000); *Kennedy v. Dugger*, 933 F.2d 905, 914 (11th Cir.1991); *cf. United States ex rel. Shaw v. De Robertis*, 755 F.2d 1279, 1281 n. 1 (7th Cir.1985) ("To carry this burden, [a petitioner] must show that it is at least likely that the misconduct complained of affected the outcome of his trial—i.e., caused the jury to reach a verdict of guilty when otherwise it might have reached a verdict of not guilty."); *see generally Strickler v. Greene*, 527 U.S. 263, 298-301 & n. 3, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999) (Souter, J., concurring in part and dissenting in part) (tracing the evolution of the "reasonable probability" formulation and noting the

applicability of that and synonymous phrases in a number of contexts).

The standard announced in *Darden* and *Donnelly* appears to be similar to the *Brady* standard. Like the *Brady* standard, the touchstone for the *Darden/Donnelly* standard is the fairness of the trial. *See Kyles*, 514 U.S. at 434, 115 S.Ct. 1555 ("The question is not whether the defendant would more likely than not have received a different verdict with the [undisclosed] evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence."); *Darden*, 477 U.S. at 181-82 & n. 13, 106 S.Ct. 2464 (noting that prosecutorial comments, although deserving of condemnation, did not violate due process because they did not affect the fairness of the trial). The *Darden* factors—i.e., the weight of the evidence, the prominence of the comment in the context of the entire trial, whether the prosecution misstated the evidence, whether the judge instructed the jury to disregard the comment, whether the comment was invited by defense counsel in its summation and whether defense counsel had an adequate opportunity to rebut the comment—require courts to place improper argument in the context of the entire trial to evaluate whether its damaging effect was mitigated or aggravated. In essence, what *Darden* requires reviewing courts to consider appears to be equivalent to evaluating whether there was a "reasonable probability" of a different result. *Cf. Brooks v. Kemp*, 762 F.2d 1383, 1401 (11th Cir.1985) (*en banc*), *vacated on other grounds*, 478 U.S. 1016, 106 S.Ct. 3325, 92 L.Ed.2d 732 (1986), *reinstated*, 809 F.2d 700 (11th Cir.1987) (*per curiam*) (noting that "fundamental fairness, the same standard adopted in

Donnelly, is the governing principle in reviewing errors of counsel [under the reasonable probability standard employed by *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)]").

Although it seems doubtful that *Darden* would impose a lower burden on petitioners than *Brady* does, we do not need to resolve the question here.[12] Instead

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[12] The magistrate judge below and the State on appeal addressed the possibility of Latin's "criminal liability" statement forming the basis of a false evidence claim. The materiality standard for false evidence is less burden-some on petitioners than that for *Brady*. *See United States v. Agurs*, 427 U.S. 97, 103-04, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); *Benn v. Lambert*, 283 F.3d 1040, 1058 n. 12 (9th Cir.2002) (recognizing that the Supreme Court employs a stricter standard of materiality for *Brady* claims than for false testimony claims). According to the Supreme Court, this is because false evidence claims "involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth-seeking function of the trial process." *Agurs*, 427 U.S. at 103-04, 96 S.Ct. 2392. Since part of the reason false evidence claims are less burdensome is the involvement of prosecutorial misconduct, one could argue that *Darden* misconduct claims should themselves also be subject to that standard. *Cf. Brooks*, 762 F.2d at 1402 n. 26 ("[T]here may be cases where the prosecutor's intentional conduct rises to a level equivalent to a knowing use of false evidence."). But that is unlikely in this case for a number of reasons. Argument in summation is hardly equivalent to evidence in its impact on a jury. *See Donnelly*, 416 U.S. at 646-47, 94 S.Ct. 1868 ("The consistent and repeated misrepresentation of a dramatic exhibit in evidence may profoundly impress a jury and may have a significant impact on the jury's deliberations. Isolated passages of a prosecutor's argument, billed in advance to the jury as a matter of opinion not of evidence, do not reach the same proportions." (internal quotation marks omitted)). Summation consists of opinion, advocacy and appeals to justice. Juries are routinely instructed to view summation in that light, and we have no reason to presume that the jury in this case, having been so instructed, viewed it

we use the framework announced in *Jackson v. Brown*, 513 F.3d 1057 (9th Cir.2008), which was created for analyzing combined *Brady* and *Napue* challenges. In *Jackson*, we reasoned that, although instances of non-disclosure and false evidence must be evaluated collectively, the difference between the materiality standards used for weighing their potential prejudice compelled us to consider the materiality of the false evidence alone before combining it with non-disclosure. *Jackson*, 513 F.3d at 1076. Thus, under *Jackson*'s framework, instances of false evidence are analyzed first under *Napue's* materiality standard, and, if those errors are not material standing alone, false evidence is then considered together with non-disclosure, and both are analyzed under *Brady's* more demanding standard. *Id.* Assuming, arguendo, that *Darden's* standard is less demanding than *Brady's*, we first analyze the prosecutorial misconduct challenges to assess whether they alone so infected the trial with unfairness as to make the resulting conviction a denial of due process. If the prosecution's comments alone do not meet this standard, we analyze them together with the non-disclosure of the July 10 letter to determine whether there is a reasonable probability that without those violations the result of the proceeding would have been different. In doing so, we concentrate on the touchstone of *Brady's* materiality standard: that, even with the trial errors, petitioners received "a trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S. at 434, 115 S.Ct. 1555.

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otherwise. In sum, the improper argument in this case did not present the same threat to the truth-seeking function of the trial process as false evidence would have. It is, thus, inappropriate to treat it as submission of false evidence.

Here, two key factors illustrate that the prosecution's summation, when viewed in the context of the entire record, did not render the trial fundamentally unfair. *See Darden*, 477 U.S. at 182-83, 106 S.Ct. 2464. First, in context, much of the potential prejudice of the prosecution's comments was mitigated. The trial court sustained a number of objections and gave timely cautionary instructions to the jury, including general instructions about the hortative nature of summation. Moreover, the comments were made in the course of several days of summation after a two-month trial. Regarding Latin's statement about McLoren's "criminal liability," which appeared in one paragraph of a summation that took up eighty-four pages of the transcript, the comment was ambiguous and, to the extent it was given its more damaging interpretation, it is likely that the comment did not have much impact. McLoren had told the jury that he was not the State's priority, from which it could conclude that he faced little risk of criminal charges. Moreover, Latin's statement was ambiguous, and we do not presume that the jury ascribed to it its most damaging meaning. *See Donnelly*, 416 U.S. at 647, 94 S.Ct. 1868 ("[A] court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations."). Even if the jury gave the statement its more damaging interpretation, the statement would have bolstered McLoren's testimony only a negligible amount, which would not have helped the prosecution's case much

anyway since McLoren had little incentive to lie.[13] Finally, the comment did not pervade the proceedings and was not emphasized.

Second, in light of the other evidence received over the course of two months of trial, the prosecution offered the only believable theory for why the fight began in the first place, i.e., that it had been instigated by Micah's attempted robbery of McLoren's drugs. Petitioners never offered a plausible alternative to this theory. Additionally, the prosecution's version of events was corroborated by petitioners' theft of Moulder's wallet to show why the group also intended to rob McLoren. In contrast, petitioners' argument here is what defense counsel argued in summation at trial, to wit, that petitioners had entered McLoren's grandparents' property to buy marijuana and that a fight had spontaneously erupted with no words exchanged between petitioners and McLoren. Although the prosecution's case relied on McLoren's testimony, petitioners' inability to advance any plausible theory for why the fight began cannot be disregarded. Accordingly, petitioners do not demonstrate that the prosecutors' improper comments affected the fairness of petitioners' trial. *See Darden*, 477 U.S. at 181 n. 13, 106 S.Ct. 2464.

We next consider whether the combined instances of non-disclosure and improper argument deprived petitioners of a fair trial, meaning "a trial resulting in a

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[13] Even if one could somehow argue that the statement was an instance of false evidence—and, thus, that the less-demanding *Napue* standard applied—the statement would still not be prejudicial. For the same reasons cited above, there is no reasonable likelihood that the statement could have affected the judgment of the jury.

verdict worthy of confidence." *Kyles*, 514 U.S. at 434, 115 S.Ct. 1555. As explained above, the fact that the prosecution advanced the only plausible theory for the instigation of the fight undercuts any claim of prejudice.

The non-disclosure of the July 10 letter does not affect this conclusion. The use immunity letter was not the potent impeachment evidence petitioners make it out to be. McLoren received no benefit—such as dropped charges or transactional immunity—from the prosecution for testifying. The grant of use immunity left McLoren in the same position he was in before speaking with Semow. Petitioners attempt to assign more importance to the letter by suggesting that there was an unspoken (or unwritten) understanding that McLoren would not be prosecuted, but there is no support in the record for this assertion.[14]

Another reason use immunity had only very limited impeachment value relates specifically to the substance of McLoren's testimony. As we stressed in our

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[14] Petitioners, pointing to the *in camera, ex parte* hearing at which Semow recollected his July 10, 1995, meeting with Sorkin, claim that Sorkin was seeking transactional immunity for McLoren. At the hearing, Semow said that "one of the reasons for this interview was to see if Mr. McLoren would testify without transactional immunity." The July 10 letter indicates that Semow achieved this goal. Thus, this statement provides no support for petitioners' contention that McLoren received transactional immunity. Even if there were such an understanding, McLoren admitted at trial that Detectives Tauson and Neumann had already told him that he was not the priority and was not likely to be charged. These representations reflected an undramatic revelation: that the State was much more interested in building a murder prosecution against petitioners than against McLoren for marijuana dealing. McLoren testified to that understanding to the jury.

discussion of petitioners' false evidence claim, McLoren never denied receiving use immunity. Importantly, he was never asked whether his statements to the prosecution and at trial could have been used against him. Moreover, because McLoren was given only use immunity, his statements that he could still have been prosecuted were also not false. Even if defense counsel had confronted McLoren with the prosecution's grant of use immunity, none of McLoren's testimony would have been exposed as untruthful. Accordingly, the combined effect of the prosecution's arguments and the non-disclosure of the July 10 letter did not deprive petitioners of a fair trial.

(2)

Cumulative Error

Petitioners' next claim is that "the cumulative effect of multiple errors" prejudiced them. *Jackson*, 513 F.3d at 1085 (internal quotation marks omitted) (quoting *Whelchel v. Washington*, 232 F.3d 1197, 1212 (9th Cir.2000)). As with petitioners' prosecutorial misconduct claims, we consider whether the cumulative error "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly*, 416 U.S. at 643, 94 S.Ct. 1868.

For many of the reasons set forth in our preceding discussion of prejudice, the alleged errors, when considered together, do not render the trial constitutionally flawed. The trial was long and hard-fought. The closing arguments were contentious, but the trial court sustained reasonable objections and admonished the prosecution on more than one occasion. The court advised the jury that the prosecution's questions regarding Jason's alleged gang membership and its statements impugning petitioners and their

counsel were not evidence. The court also gave general instructions that arguments made in summation were not evidence, thereby reducing the potential harm done by the prosecution's vouching for McLoren. Additionally, the prosecution's "criminal liability" statement was ambiguous and, in any event, occupied only a brief moment in summation at the end of a long trial and had little risk of rendering the entire trial unfair.

Similarly, the undisclosed evidence was not material. McLoren testified both that he understood that he was not the priority and that he was told by the police that the State had no interest in prosecuting him. Moreover, if one were to accept petitioners' argument that they were on the property merely to buy drugs, then, as noted, the reason for the fight makes little sense. Therefore, any trial errors, to the extent they existed, did not prejudice petitioners.

(3)

Ineffective Assistance of Counsel

Finally, Miliotti contends that he received ineffective assistance of counsel when his trial counsel, Leftwich, who had a copy of the use immunity letter at the time of trial, failed to cross-examine McLoren with it.[15] We reject Miliotti's claim.

Claims of ineffective assistance of counsel are governed by *Strickland*, which requires a petitioner to demonstrate: (1) "that counsel's performance was

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[15] Miliotti also faults Leftwich for failing to impeach McLoren on his statement to the police that petitioners had tried to steal his electronics, failing to impeach him on his arrest for marijuana use in August 1995, failing to introduce evidence of previous burglaries of the fort and failing to introduce a lack of any fingerprint evidence.

deficient" and (2) "that the deficient performance prejudiced the defense." 466 U.S. at 687, 104 S.Ct. 2052. As Miliotti must satisfy both prongs in order to prevail under *Strickland*, we may dispose of his claim if he fails to satisfy either prong of the two-part test. *Id.* at 697, 104 S.Ct. 2052.

Turning first to the "performance prong," Miliotti "must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688, 104 S.Ct. 2052. Courts must be "highly deferential" to counsel's performance such that "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689, 104 S.Ct. 2052 (internal quotation marks omitted).

Miliotti cannot rebut the presumption that Leftwich's failure to confront McLoren with the July 10 letter was sound trial strategy. As explained earlier, there was little, if anything, to be gained by questioning McLoren about having been granted use testimony. Rather than pursuing a fruitless attempt to impeach McLoren with the use immunity letter, Leftwich instead focused on the inconsistencies in McLoren's description of Millioti's actions. McLoren admitted that he did not recall whether Miliotti was involved in the fight and testified inconsistently about whether Miliotti had even entered the fort, where the entirety of the fight took place. It also emerged during trial that McLoren had initially named Velardo—who never entered the property—as the fourth attacker when he was questioned by the police, a fact that Leftwich focused on in summation. Leftwich's strategy bore fruit when the California Court of Appeals concluded that Miliotti was not a major participant in

the attempted robbery and reduced his conviction to second degree murder, finding that "the evidence is persuasive that Miliotti did not enter the fort, but merely stood in the doorway during the activities inside the fort." *Hein*, 104 Cal.Rptr.2d at 92, 95. Leftwich's performance was, thus, not deficient for failing to raise the use immunity letter.

Even if Miliotti satisfied the first prong, he must still establish prejudice by "show[ing] that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. This is the same standard used to determine the materiality of suppressed evidence under *Brady*. *See Bagley*, 473 U.S. at 682, 105 S.Ct. 3375; *Benn*, 283 F.3d at 1053 ("[W]e analyze all of the suppressed evidence together, using the same type of analysis that we employ to determine prejudice in ineffective assistance of counsel cases."). Because petitioners' case was weak and McLoren admitted that he was probably not going to be prosecuted and never denied having received immunity, Miliotti was not prejudiced by counsel's failure to impeach McLoren with the use immunity letter. Miliotti's other allegations of ineffective assistance of counsel are without merit.

CONCLUSION

Under our independent review of the record, we determine that petitioners' state convictions did not violate the Constitution or laws of the United States. It was therefore not objectively unreasonable for the California Supreme Court to deny petitioners' state habeas petitions. We affirm the district court's denial of habeas relief.

AFFIRMED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

FILED - SOUTHERN
DIVISION CLERK, U.S.
DISTRICT COURT
APR-3 2007
CENTRAL DISTRICT OF
CALIFORNIA
BY [ILLEGIBLE] DEPUTY

MICAH HOLLAND,	) Case Nos.
JASON SKIP HOLLAND,	) CV 04-3407-SJO (MLG)
TONY MILIOTTI,	) CV 04-3416-SJO (MLG)
BRANDON WADE	) CV 04-3491-SJO (MLG)
HEIN,	) CV 04 3502-SJO (MLG)
	)
Petitioners,	) REPORT AND
	) RECOMMENDATION
v.	) OF UNITED STATES
	) MAGISTRATE
DERRAL ADAMS,	) JUDGE
Warden, GEORGE A.	)
ORTIZ, Warden, JIM	)
HALL, Warden,	)
MICHAEL G.	)
YARBOROUGH, Warden,	)
	)
Respondents.	)

I. Background and Procedural History

On May 22, 1995, Michael McLoren and his best friend Jimmy Farris were socializing together in

McLoren's backyard after school and into the evening.[1] Both McLaren and Farris were high school students, Farris being 17 years old and the elder of the two. McLoren had a freestanding 10-foot by 12-foot structure in his backyard called "the fort." The fort had a bed, sofa, and desk and had electricity running from McLoren's house to power a television, video game player, and lights. McLaren often socialized at the fort and it served as a gathering place for his friends. McLoren also sold marijuana from the fort.

During the afternoon of May 22, 1995, McLoren's girlfriend, Stacey Williams, arrived at the fort with three friends. Soon after, Williams and her friends left to buy some higher quality marijuana than McLoren had available. When they returned, the group smoked the marijuana and watched the film *Pulp Fiction*. Williams and her friends left the fort sometime between five and seven o'clock that evening. Soon after they left, McLoren went into his house to eat dinner with his family while Farris waited in the fort.

After dinner, McLoren hit a heavy punching bag outside of the fort while Farris sat nearby. At approximately 7:00 p.m., Christopher Velardo drove Petitioners Brandon Hein, Jason Holland, Micah Holland,[2] and Tony Miliotti to McLoren's house in a pickup truck. Velardo stayed in the truck and he was not a party to the criminal trial which gives rise to this

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[1] The facts are taken from the trial transcript and the opinion of the California Court of Appeal. *People v. Hein*, 104 Cal. Rptr. 2d 85 (Cal. Ct. App. 2001) (opinion ordered not published) [hereinafter Cal. Ct. App.]; *see also* Miliotti Answer, Ex. A.

[2] Micah Holland is Jason Holland's younger brother. At the time of these events, Micah was 15 years old, Jason and Hein were 18 and Miliotti was 17.

habeas corpus action. McLoren and Farris watched as Petitioners entered McLoren's backyard by hopping over a fence. Micah Holland was in the lead, followed by the other three. Jason had a folding pocketknife in his possession. There is no evidence that Micah, Hein, or Miliotti carried weapons or that any of them knew that Jason had a pocketknife.

McLoren was not expecting Petitioners, and while he and Farris knew Petitioners, they were not friendly with them. McLoren was least familiar with Hein, whose last name he did not know. McLoren was wary of Micah and Jason Holland because of what was characterized as the "Wiley incident." When McLoren was in eighth grade, approximately two years before the incident at issue here, McLoren and David Wiley stole a gun from the house of a police officer whose daughter was their friend. McLoren was apprehended by the police and provided them with information about Wiley's involvement. Wiley was significantly older than McLoren, approximately 20 years old at the time, and a member of a local gang. According to McLoren, once he informed on Wiley, McLoren became a target of violence and had to change high schools three times to avoid being beaten up on a regular basis. According to McLoren, Micah Holland was friendly with Wiley and had threatened McLoren with violence.

McLoren testified that as Petitioners approached the fort he asked Micah "What's up?". Micah did not respond, was "sort of angry-looking," and entered the fort uninvited. (Cal. Ct. App. at 3; 32 RT at 3570; 3577-79). McLoren immediately followed Micah inside. According to McLoren, Micah tugged on the locked drawer of his desk, where McLoren kept his supply of marijuana for sale, and screamed: "Give me the keys,

fool," and "You want to start shit with Gumbys?".[3] (31 RT at 3588). Initially, only McLoren and Micah were in the fort. Shortly thereafter, according to McLoren, Hein and Jason entered the fort and Hein screamed "Give him the keys." (32 RT at 3589).

It is undisputed that a fight quickly erupted involving McLoren, and Micah, into which Jason soon intervened. McLoren testified that Hein also attacked him, but Jason did not remember seeing Hein in the fort. Farris entered the fort soon after the fighting had started. Miliotti remained in the doorway. McLoren, who was larger than Micah, held Micah's face down in a headlock on the bed and repeatedly elbowed him in the back and neck. Jason attempted to pull McLoren off his brother and McLoren kicked Jason in the face. McLoren then heard a voice, who he believed to be Jason, say "Let's get this fucker." (32 RT at 3596). While being held in a headlock, McLoren was stabbed three times by Jason. Jason was then spun around and was confronted by Farris. Jason stabbed Farris twice. McLoren and Farris broke away from the fight and ran into McLoren's house. Petitioners hopped back over the fence and left in Velardo's truck.

After running inside the house, McLoren told his mother that he and Farris had been stabbed and that "they came to get our stuff" and "we tried to fight them off." (34 RT at 4126-27). Police and paramedics arrived. Before being taken to the hospital, McLoren identified Jason, Micah, Hein, and Chris Velardo as those responsible for the stabbing. Several days later,

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[3] Gumbys is apparently the name of a local gang. After a four-day pre-trial hearing, the trial court ruled that there was insufficient evidence to show that Petitioners were gang members. (21 RT 2035.)

McLoren identified Miliotti as a participant and excluded Velardo. Farris died at the hospital from his wounds.

Petitioners were charged with burglary (Cal. Penal Code § 459), attempted robbery (§ 664/221), felony murder of Farris (§ 187(A)), and attempted murder of McLoren (§ 664/187(A)) with allegations of personal use of a knife (§ 12022(B)) and infliction of great bodily injury (§ 12022.7(A)). (Lodgment No. 3, 1317-19). They were tried jointly before a jury in Malibu, California, in a trial that lasted from March to May 1996.[4]

The prosecution's theory of the case was that Petitioners went to the fort with the intent to steal marijuana from McLoren. The burglary and attempted robbery charges provided the basis for Petitioners' liability for felony murder.[5] In order to show intent and identity, the prosecution offered evidence that Petitioners had stolen a wallet from a car approximately one hour before they arrived at McLoren's fort. Petitioners were in a pickup truck being driven by Chris Velardo. They pulled up next to a van at Gates Park in Thousand Oaks. There were no other cars at the park at that time. Jason opened the unlocked van door and stole a wallet which was in plain view. The car's owner, Alyce Moulder, was at the park with her children and saw Jason take her wallet. After

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[4] Trial counsel included Assistant District Attorneys Jeff Semow and Michael Latin for the prosecution, James Sussman for Micah Holland, Ira Salzman for Jason Holland, Jill Lansing for Brandon Hein, and Curt Leftwich for Tony Miliotti.

[5] Murder which is "committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, [or] train wrecking . . . is murder of the first degree." Cal. Penal Code § 189.

Petitioners left, Moulder went to look for them in her van and encountered them in a nearby shopping mall. Moulder testified that Hein threatened her with a steering wheel locking device known as "the club." (27 RT 2941). She testified that Petitioners threatened her and pounded on her van as she drove away. (27 RT 2947). The prosecution portrayed the incident as evidence of Petitioners' thrill- seeking behavior.

In addition to the testimony of Alyce Moulder, the prosecution also presented the testimony of some of McLoren's neighbors who observed Velardo's truck parked on the wrong side of the street immediately before the stabbing, and who also confirmed that Petitioners hopped the fence into McLoren's yard. David Barber, who was jogging in the area at the time, testified that he observed Petitioners leaving the McLoren driveway, talking and smiling amongst themselves. (34 RT at 4092-93; 4096-98). Also, a gang expert testified that "Gumbys" was the name of an organized local street gang, and defined a gang as "a group of individuals who have banded together under one common name for criminal activity purposes." (36 RT at 4461-62). However, McLoren's eye-witness account of Micah's demands and threatening behavior as well as the subsequent fight provided the only direct evidence of Petitioners' intent to steal the marijuana at the fort.

Petitioners' theory of the case was that there had been no robbery or burglary. Petitioners argued that they went to McLoren's fort to buy marijuana, not to steal it. Alternatively, Jason, Hein, and Miliotti argued that if Micah intended to steal the marijuana, he did not tell the others and was acting alone.

Jason Holland was the only one of the Petitioners to testify. Jason testified that, sometime between 2:00 and 3:00 p.m. that day, he traveled to Gates park to smoke marijuana with a group of friends, a group that did not include Hein, Micah, or Miliotti. (38 RT at 4850-53). Soon after, Jason went to his friend Jason Stout's house, where he and several friends drank alcohol, played ping pong, watched movies, and talked. (38 RT at 4856). Sometime between 5:00 and 5:30 p.m., Hein, Micah, and Miliotti arrived in Velardo's truck, and all four Petitioners "hung out and drank and played ping-pong." (38 RT at 4859). Eventually Petitioners and Velardo left Stout's residence and drove to Gates Park where, according to Jason, Petitioners were just planning to "hang out" and "finish drinking." (38 RT at 4864). Jason admitted to stealing Moulder's wallet at the park. Jason testified that he did not tell any of the other Petitioners that he was planning to steal the wallet, or that he had, in fact, stolen the wallet. (38 RT at 4868).

Jason further testified that he did not know why they went to McLoren's house:

Q Did you ask why you were there?

A I asked Chris, "What are we doing here?"
And he said, "We're going to get some weed."

Q What did you interpret that to mean?

A We were going to buy some marijuana.

(38 RT at 4886). Jason testified that he too heard McLoren ask Micah "What's up?" as they approached the fort. According to Jason, however, Micah waved to McLoren and Farris as he approached them. (38 RT at 4888). Jason did not hear Micah or Hein say anything after they entered the fort. (38 RT at 4890; 4891-92). Jason stated that he did not hear Micah demand keys

from McLoren and did not know why the fight started. (38 RT at 4890-93). Jason admitted to stabbing both Farris and McLoren. He also testified that the other three Petitioners were unaware that he had stabbed Farris or McLoren until after they had all left McLoren's property.[6]

On May 28, 1996, all Petitioners were convicted of burglary, attempted robbery, and felony murder. In addition, Jason was convicted of assault with a deadly weapon. On August 26, 1996, Jason was sentenced to life in prison without possibility of parole plus eight years, both Hein and Miliotti were sentenced to life without the possibility of parole plus four years, and Micah was sentenced to twenty-nine years to life. (*See* Cal. Ct. App. at 2).

Petitioners jointly appealed their convictions to the California Court of Appeal, alleging inconsistent verdicts, improper admission of evidence of the Moulder wallet theft, prosecutorial misconduct based on questions about gang membership and improper statements in closing argument, improper jury instructions, improper denial of *Wheeler-Batson*[7] motions, judicial bias, juror misconduct, improper exclusion of evidence about McLoren's civil liability,

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[6] Jason testified that after Petitioners had left McLoren's property and were traveling in Velardo's truck, he said to Hein, "I think I stabbed them." (38 RT at 4913). Hein did not respond. (38 RT at 4914). A short time later, once all the Petitioners and Velardo had gotten out of the truck, Jason told everyone that he thought he had stabbed Farris and McLoren. (38 RT at 4915-17). Jason stated that no one believed him until he showed them his pocketknife. (38 RT at 4916-17).

[7] *Batson v. Kentucky*, 476 U.S. 79 (1986); *People v. Wheeler*, 22 Cal. 3d 258 (1978). These cases prohibit challenges to a juror based on racial motivation.

denial of right to a speedy trial as to Hein, improper admission of expert testimony about gangs, improper use of courtroom security measures, unconstitutionality of Penal Code § 190.2(d), improper application of Penal Code § 654, insufficient evidence to sustain felony murder convictions, insufficient evidence to sustain special circumstance findings, and cruel and unusual punishment. On January 29, 2001, the court of appeal, in an unpublished decision, denied all of Petitioners' claims except Miliotti's challenge to the special circumstance findings and his cruel and unusual punishment claim. *People v. Hein*, 104 Cal. Rptr. 2d 85 (2001) (Opinion ordered not published). The court found that the evidence was insufficient to show that Miliotti was a major participant in the burglary or attempted robbery and struck the special circumstance finding. (Cal. Ct. App. at 28). In addition, based on the holding in *People v. Dillon*, 668 P.2d 697 (Cal. 1983), the court found that Miliotti's conviction violated California's constitutional proscription against cruel and unusual punishment and must be reduced from first degree to second degree murder. (Cal. Ct. App. at 32-33).

The California Supreme Court denied Petitioners' petition for review on April 25, 2001. Hein filed a petition for a writ of certiorari with the United States Supreme Court which was denied on October 1, 2001. *Hein v. California*, 534 U.S. 890 (2001). Petitioners filed a petition for writ of habeas corpus with the California Supreme Court on September 23, 2002, which was summarily denied on May 12, 2004. (Hein Pet., Ex. B). Petitioners filed individual petitions for

writs of habeas corpus with this Court in May and July of 2004.[8]

Petitioners raise identical, overlapping, and separate claims. Because the majority of Petitioners' claims are the same, this Court will consider the petitions together and issue a joint Report and Recommendation in this case. Petitioners challenge their convictions based on the following claims: (1) *Brady*[9] violations, (2) prosecutorial misconduct, (3) ineffective assistance of counsel, (4) improper exclusion or admission of evidence, (5) juror misconduct, (6) judicial misconduct, (7) cruel and unusual punishment, and (8) arbitrary and capricious sentence reduction.[10]

II. Standard of Review

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d), a federal court may grant a writ of habeas corpus to a state prisoner with respect to a claim that was adjudicated on the merits in state court only if the state courts' decisions were "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or if the ruling was "based on an unreasonable determination of the facts in light of the evidence presented" in the state courts. *See Anderson v. Terhune*, 467 F.3d 1208, 1212-13 (9th Cir. 2006).

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[8] Jason and Micah filed their petitions on May 13, 2004, Miliotti filed his on May 18, 2004, and Hein filed his on July 2, 2004.

[9] *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

[10] Although Hein and Micah Holland originally asserted an ineffective assistance of appellate counsel claim, they no longer advance that claim. (*See* Hein Traverse at 38; Micah Traverse at 24.)

Federal habeas corpus relief is granted "only on the ground that [the state prisoner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Mere errors of state law are not cognizable in federal habeas corpus proceedings. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *Pulley v. Harris*, 465 U.S. 37, 41 (1984).

The Supreme Court explains that a state court decision is "contrary to" clearly established federal law if the state court "applies a rule that contradicts the governing law set forth in our cases" or if it "confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000)). A state court need not cite or even be aware of Supreme Court precedents, "so long as neither the reasoning nor the result of the state-court decision contradicts them." *Mitchell v. Esparza*, 540 U.S. 12, 16 (2003) (per curiam) (citing *Early*, 537 U.S. at 7).

A state court decision involves an "unreasonable application of" clearly established federal law if the state court identifies the correct governing legal principle from the decisions of the Supreme Court, but unreasonably applies that principle to the facts of the case. *Williams*, 529 U.S. at 407-08, 413. Under this standard, a habeas court may not issue the writ simply because that court concludes "in its independent judgment" that the state court decision is incorrect or erroneous. *Woodford v. Visciotti*, 537 U.S. 19, 24-25 (2002); *Williams*, 529 U.S. at 410, 412. The reviewing court must find that the state court's application of clearly established law was objectively unreasonable.

Williams, 529 U.S. at 409; *Anderson*, 467 F.3d at 1212-13.

Petitioners' claims asserting ineffective assistance of counsel, *Brady* violations, and arbitrary and capricious sentence reduction were presented for the first time in habeas corpus petitions filed in the California Supreme Court. (Lodgments 10, 11, 12, 13). These petitions were denied without a decision addressing the merits of Petitioners' claims. Therefore, this Court must conduct "an independent review of the record" to determine whether the state's decision was an objectively unreasonable application of Supreme Court precedent. *Himes v. Thompson*, 336 F.3d 848, 853 (9th Cir. 2003).

The remaining claims raised in the petitions were presented to the California Supreme Court on a petition for review, but that court did not address those issues in its written decision. Nevertheless, "[w]here there has been one reasoned state judgment rejecting a federal claim, [federal courts are to presume] later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991); *Shackleford v. Hubbard*, 234 F.3d 1072, 1079 n.2 (9th Cir. 2000). The California Court of Appeal rejected Petitioners' claims on direct review in a written decision. Therefore, this Court will examine the reasoning of the California Court of Appeal to determine whether the California Supreme Court's decision is contrary to, or an unreasonable application of, federal law.

III. *Brady* Violations

Jason, Micah and Hein claim that the prosecution failed to disclose a letter from Deputy District

Attorney ("D.D.A.") Jeff Semow to Michael McLoren's attorney, Ellery Sorkin, granting McLoren immunity from prosecution for any testimony about his involvement with marijuana.[11] It is also alleged that the prosecution suppressed material evidence of the existence of an underground safe in McLoren's fort, information about an interview given by Katren Anderson,[12] and McLoren's marijuana arrest prior to trial. These claims are governed by the Supreme Court's decision in *Brady v. Maryland*, 373 U.S. 83, 87 (1963).[13]

The government has a duty to disclose evidence favorable to the accused when it is material to guilt or punishment. *Brady*, 373 U.S. at 87. There are three components to a *Brady* violation: The material

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[11] Petitioner Miliotti does not join in this claim. His habeas counsel found the immunity letter in the trial materials given to him and his trial counsel recalled Semow disclosing McLoren's immunity agreement during a juvenile fitness hearing on July 24, 1995. (Miliotti Pet., Ex. 12 at 77-78). Miliotti is raising an ineffective assistance of counsel claim relating to the immunity letter. *See infra* Part VI.A.

[12] Katren Anderson was a friend of the Petitioners. She gave Jason Holland a ride to Gates park on May 22, 1995, and saw all four Petitioners and Velardo later at a friend's house. Anderson did not testify at trial.

[13] Petitioners also allege that the prosecution knowingly presented false testimony and argument regarding McLoren's motivation for testifying against Petitioners and his potential exposure to criminal prosecution for selling marijuana. The falsity of the testimony and argument is evidenced by the undisclosed immunity agreement. This claim will be analyzed in section IV of this Report under the standards set forth in *United States v. Agurs*, 427 U.S. 97 (1976) and *Napue v. Illinois*, 360 U.S. 264 (1959), although it is dependent upon and overlaps with the *Brady* claim.

evidence "must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). The duty to disclose is not limited to "exculpatory" information, but also includes information that could be used to impeach government witnesses. *Giglio v. United States*, 405 U.S. 150, 154 (1972). It is irrelevant whether the evidence was suppressed willfully or inadvertently. *United States v. Ciccone*, 219 F.3d 1078, 1084 (9th Cir. 2000) (citing *Strickler*, 527 U.S. at 280.) For *Brady* purposes, evidence is deemed material only "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles v. Whitley*, 514 U.S. 419, 433 (1995); *Bagley v. United States*, 473 U.S. 667, 676 (1985). The most compelling and complicated *Brady* claim involves the failure to disclose an immunity agreement given to McLoren. The facts concerning the origin and disclosure of that agreement must be recited in order to place this issue in perspective.

A. McLoren's Immunity Agreement

The immunity letter was written by D.D.A. Jeff Semow to Michael McLoren's attorney, Ellery Sorkin. It granted McLoren immunity for any testimony regarding McLoren's use, possession, or sale of marijuana.[14] (Hein Pet. at 33-45; Micah Pet., Att. 3 at

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[14] Hein also alleges that prosecutors violated *Brady* by failing to disclose McLoren's request for transactional immunity and that McLoren was granted de facto transactional immunity. (Hein Pet. at 35-36). These claims are factually similar to the immunity letter

3; Jason Pet. at 5). The letter is dated July 10, 1995, and states in its entirety:

> Dear Mr. Sorkin:
>
> This is to assure you and your client, Michael McLoren, that nothing he tells me or the investigating officers about marijuana will be used in any way against him.
>
> Gil Garcetti, District Attorney
>
> By Jeff Semow, Deputy District Attorney

(Miliotti Pet., Ex. 10.)[15]

This letter apparently was written in order to induce McLoren to admit that he was selling marijuana from the fort, and that Petitioners had come to steal it, freeing him from the fear of criminal prosecution for his marijuana activities. It is the failure to disclose this letter to trial counsel which forms the factual predicate for Petitioners' *Brady* claim.

Shortly after the incident, McLoren hired attorney Ellery Sorkin to represent him during the investigation. (33 RT at 3860). McLoren later testified at trial that, at the time of his initial interviews with

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claim, and the materiality arguments are identical. Therefore, the Court will deem this claim to be subsumed by the immunity letter claim.

[15] Petitioners allege that McLoren's grant of immunity was effectively transactional immunity, instead of use immunity, because in 1995, the California Penal Code recognized only transactional immunity. (Miliotti Pet. at 32-40; Hein Pet. at 36-37.) Use immunity protects a witness from having his statements used against him, as well as any evidence derived from his statements, while transactional immunity protects a witness from prosecution for crimes described in his statements. *See Kastigar v. United States*, 406 U.S. 441, 443 (1972). The resolution of the *Brady* claim is not dependent on resolving this distinction.

Detective Tauson, the lead investigator, he did not "trust the police" because he "was doing illegal things" and did not feel he "could tell the police everything and talk to them openly and not suffer the consequences from it." (33 RT at 3921-22). It wasn not until McLoren spoke with Sorkin, after his initial interviews with Detective Tauson, that McLoren "felt ready to tell the truth about [his] involvement with marijuana, the extent of [his] dealing in marijuana, the extent of [his] use of marijuana to the authorities." (33 RT at 3922-23). McLoren further testified that it wasn not until his lawyer told him that he would not "be able to get these guys" unless he told the whole truth that he was, "for the first time," ready to be honest with law enforcement officials. (33 RT at 3923). The first person McLoren talked to from law enforcement after that conversation with Sorkin was D.D.A. Jeff Semow, on July 10, 1995. (33 RT at 3923).

1. Production and Discovery of The Immunity Letter

It appears that counsel for Micah, Jason and Hein never received the immunity letter from the prosecution, although it was mentioned by D.D.A. Semow at a juvenile fitness hearing for Micah, Miliotti, and Velardo, on July 24, 1995. At that hearing, the following exchange took place between Bruce Jones, counsel for Velardo, and D.D.A. Semow:

> Jones: I would ask, if there any [sic] more discovery, since our last appearance, we had a promise of discovery; I know that at the time that - of our last appearance, we parted with the discussion in the district attorneys' office in the presence of all counsel, about an immunity agreement

for Mr. McLoren, and I think I heard some information about further investigation.

I have received no further discovery, but then again -

Semow: There is no immunity agreement for Mr. McLoren, other than I promised him in writing that nothing that he said in this case about Marijuana, would be used as evidence against him.

That is it.

(Miliotti Pet., Ex. 9 at 63-64). There was no other discussion about the immunity letter, including whether it would be turned over to defense counsel.

Based on the signed declaration of Curt Leftwich, who was Miliotti's attorney at both the juvenile hearing and the criminal trial, it appears that the prosecution turned over the letter to Leftwich during Miliotti's juvenile fitness hearing. (Miliotti Pet., Ex. 12 at 77-78). In that declaration, Leftwich acknowledged that because the letter was found in his trial materials he must have received it during his representation of Miliotti. (Id. at 77). After reviewing the juvenile hearing transcript Leftwich recalled that he learned of the immunity agreement during Miliotti's juvenile court proceedings. (Id. at 77-78).

Micah Holland, the only petitioner raising a *Brady* claim who participated in the juvenile court hearing, was represented by John Franklin in juvenile court and by James Sussman during the criminal trial. In a declaration signed on July 21, 2002, Sussman stated that he was unaware of the immunity letter or any immunity agreement until Micah's habeas corpus attorney showed him the letter in July 2002. (Micah,

State Pet., Ex. 12 at 77-78.) Sussman stated that after Micah was transferred to the adult court, he prepared a writ challenging the findings of the juvenile court. However, at the time he drafted the writ, the transcript from the juvenile proceeding had not yet been prepared. By the time the transcript became available to Sussman, the writ had been denied. Sussman stated that he then reviewed the transcript for testimonial grounds to impeach witnesses at trial, but did not "[pay] attention to the discussions or arguments of counsel." (Id.).

The letter was also mentioned, although the content was not described, in passing during a pretrial discovery hearing on September 15, 1995, immediately following *in camera* proceedings between the trial judge and D.D.A. Semow. Each Petitioner was present and represented by trial counsel.[16] The purpose of the *in camera* proceeding was to give the court another opportunity to review documents in the possession of the prosecution and to decide whether the prosecution was obligated to disclose those documents to defense counsel. (1 RT at 99A-100A). The court issued its decision at that hearing where the following exchange occurred:

Court: I'm going to authorize and release it to them, these three documents.

Semow: Those will be available at 1:30: *A July 10 letter from the district attorney;* an August 11 letter consisting of two pages; what appears to be a misdemeanor

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[16] Jason Holland was represented that day by James Sussman, attorney for Micah Holland, because Jason's attorney, Ira Salzman, could not be present. (1 RT at 86A).

> complaint, 95M00754, attached documents, a police report. A supplementary report bearing the number 495-00136-2222-072; and another complaint report bearing a D.R. number of 195-06108-2223-189. So that can be disclosed to counsel.

(1 RT at 100A) (emphasis added). The only "July 10" letter of which this Court is aware is the immunity letter written by Semow.

As noted, sometime in early 2002, a copy of the immunity letter was found by Miliotti's habeas corpus counsel in the file which attorney Curt Leftwich gave to the Miliotti family after the trial ended. (Miliotti Pet. at 33; Mil. Ex. 11 at 74). It was shared with the rest of Petitioners and forms the basis of this claim.

Habeas counsel then gained access to transcripts of a separate pretrial *in camera* proceeding held January 10, 1996, between the prosecutors and the trial judge that previously had been sealed. The purpose of that *in camera* proceeding was to determine whether two sets of prosecution notes taken during interviews with McLoren had to be disclosed to the defense. (RT 284A, 288A, 585A-86A). Semow explained to the court that, before his July 10, 1995 interview with McLoren, Sorkin had expressed a concern that the district attorney was "building a marijuana prosecution" against his client. (Hein Pet., Ex. K at 104). Semow later explained that, "So prior to th[e] [July 10] interview, a concern regarding the possible need to give him immunity had arisen" and as a consequence, "one of the reasons for th[e] [July 10] interview was to see if Mr. McLoren would testify without transactional

immunity."[17] (Id. at 105). McLoren did not speak with Semow until after he had received the July 10, 1995 letter.

Hein's trial counsel, Jill Lansing, states in a signed declaration that she had no recollection of receiving the immunity letter or of being informed that McLoren had received immunity. (Hein Pet., Ex. Q at 151). Lansing submitted signed discovery receipts from before and after September 15, 1995, none of which include the immunity letter. (Id. at 171). Lansing also submitted written discovery requests to the prosecution for any promises or agreements requested by witnesses and any reports regarding police contact with McLoren. (Id. at 152, 165). The immunity letter was not turned over to her in response to those requests. (Id. at 152). Lansing declared that had she had known of the immunity agreement she would have cross-examined McLoren about it. (Id. at 153).

Ira Salzman, trial counsel for Jason Holland, submitted a similar declaration on July 2, 2002. (Jason, State Pet., Ex. 29). He stated that he had no recollection of seeing the immunity letter before July 2002 and that if he had been in possession of the letter, he would have used it during trial to impeach McLoren's credibility. (Id.) Thus, with the exception of Miliotti's attorney, Petitioners' trial counsel did not receive the immunity letter, nor were they directly informed of the grant of immunity given to McLoren.

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[17] Semow was interviewed for a documentary film about the case. He stated his belief that only after McLoren received use immunity did he give a statement that Semow believed was "100 percent truthful." (Miliotti Pet., Ex. 11 at 76).

2. Analysis

Petitioners meet the first *Brady* element requiring that the withheld or nondisclosed evidence be exculpatory or impeaching. The immunity letter could obviously have been used to impeach McLoren's credibility by showing that he made inconsistent statements about the objective of the alleged robbery. *Bagley*, 473 U.S. at 676 ("Impeachment evidence, however, as well as exculpatory evidence, falls within the *Brady* rule.").

The second *Brady* element is met because Petitioners' trial counsel did not receive the immunity letter as part of discovery, nor were they directly informed of the specific grant of immunity relating to the sale of marijuana. The prosecution's failure to disclose the letter seems to have been inadvertent, since Semow disclosed its existence at the juvenile fitness hearing and presented it to the trial court to determine whether disclosure was necessary. However, as noted earlier, even inadvertent suppression can constitute a *Brady* violation. *Agurs*, 427 U.S. at 110 ("If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor."). While Semow apparently gave the letter to Leftwich at the juvenile fitness hearing, the uncontested evidence shows that it was not given to trial counsel for the remaining Petitioners, even though it was mentioned during the pre-trial hearing.[18]

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[18] Semow's description of the immunity letter as "a July 10 letter from the district attorney" gave no indication to defense counsel of the subject matter or import of the letter's contents. The Court also rejects any claim that the existence of the letter should have been apparent from the transcript of the juvenile

The Supreme Court has held that evidence has been suppressed when "defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed." *Banks v. Dretke*, 540 U.S. 668, 695 (2004). "A rule thus declaring 'prosecutor may hide, defendant must seek' is not tenable in a system constitutionally bound to accord defendants due process." *Id.* The existence of the letter was not made clear to trial counsel, even though the trial judge apparently ordered that it be disclosed following the *in camera* hearing on September 15, 2005. Therefore, Petitioners have met the second *Brady* requirement by showing that the immunity agreement was not disclosed.

The Court concludes, however, that Petitioners have not satisfied the materiality element of a *Brady* violation. They have failed to establish that disclosure of the agreement alone would have "put the case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 433-35. In other words, it cannot be said that the result of the proceeding would have been different had defense counsel been able to impeach McLoren with the immunity agreement. Accordingly, habeas corpus relief is not warranted on this claim.

McLoren was thoroughly impeached with the inconsistent statements he made after the incident; his use and sale of marijuana; and the absence of any criminal prosecution arising from his involvement with

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fitness hearing. *See Banks*, 540 U.S. at 695; *see also Strickler v. Greene*, 527 U.S. 263, 284 (1999) (rejecting contention that examination of trial testimony and a letter published in a local newspaper should have alerted the defendant to the existence of additional undisclosed interviews with the police).

controlled substances. It was made abundantly clear on cross-examination that immediately following the incident, McLoren lied about what Petitioner's were attempting to steal and his use and sale of marijuana. McLoren admitted that he used marijuana on a daily basis and had sold marijuana on school grounds. (33 RT 3777-82). McLoren admitted that he had previously lied to police about his involvement with marijuana. (32 RT 3707-08, 3745-50, 33 RT 3818, 3852). McLoren's credibility was further impeached by prior crime evidence. McLoren acknowledged on cross-examination that he had previously stolen a policeman's gun and lied to police about his involvement in that theft. (33 RT 3851, 3904-05, 3908, 34 RT 4068). And, it was brought out that McLoren did not tell Deputy Christopher Knox, the second officer to arrive on the scene, that Micah Holland tugged on his desk drawer nor did he mention anything about marijuana. (37 RT at 4657).

However, he was consistent in his claim that the Petitioners came to rob him. When he ran into the house after the robbery, McLoren told his mother that "they came to get our stuff." (34 RT at 4127). McLoren told Deputy Knox that Jason Holland, Micah Holland, Brandon Hein, and Chris Velardo told him that if they did not get the VCR and TV equipment inside the fort there was going to be a fight. (37 RT at 4650, 4656, 4657).

On May 26, 1995, McLoren was interviewed by Detectives Tauson and Neumann. McLoren said he believed that the Holland brothers, Hein, and Velardo had come to take his video games. (33 RT at 3758, 3762). He also told the detectives that he thought "they were seriously just bored" and figured that they

could get "a free TV, VCR . . . and maybe even a like a little bit of marijuana to go with." Later in the same interview, McLoren explained that, "I think that's part of the reason they came for. I have a pretty nice collection of video games. Maybe they wanted my boxing stuff, I don't know. I have a lot of nice stuff in my fort." When asked about the marijuana found by the police in the desk drawer in the fort immediately after the incident, McLoren said that it was just for "parties and stuff" and denied ever having sold marijuana. On June 5, 1995, Tauson interviewed McLoren for a second time at McLoren's home. Tauson's notes do not reveal any discussions about marijuana. (Miliotti Pet., Ex. 8, at 60-61).

There were additional statements made by McLoren which could be deemed inconsistent with McLoren's trial testimony that Petitioners were attempting to rob him of marijuana. While being treated for his wounds at UCLA hospital the day after the stabbing, McLoren told a clinical social worker and a registered nurse that he had been injured in a "fight." (37 RT at 4707, 4717). He did not mention an attempted robbery of any kind. (Id.). That same day McLoren told Officer John Adams only that a fight broke out, and that he and Farris were winning the fight until Hein, Micah, and Jason pulled out knives. (38 RT at 4799-4800). However, these inconsistencies were also brought out on cross-examination.

In light of the consistency of McLoren's statements concerning Petitioner's motives as well as his admission of significant inconsistent statements and illegal conduct, including the sale of marijuana, the failure to disclose the immunity agreement cannot be deemed material. Had it been disclosed, the immunity

agreement would have added little to the cross-examination and would not have "put the case in such a different light so as to undermine the verdict." Kyles at 433-35.

The Court has considered Petitioners' claim in light of the Ninth Circuit's decisions in *Horton v. Mayle*, 408 F.3d 570 (9th Cir. 2005) and *Silva v. Brown*, 416 F.3d 980 (9th Cir. 2005). Those cases, like that presented here, involved immunity agreements for key government witnesses that were not disclosed to the defense.

In *Horton*, the petitioner was convicted of the first degree murder and robbery of his cocaine dealer. The prosecution's principal witness, Donald McLaurin, did not participate in the murder, but was present when the petitioner planned and later confessed to the robbery and the murder. *Horton*, 408 F.3d at 574. After the murder, McLaurin smoked some of the stolen cocaine with the petitioner and then drove the petitioner to the Greyhound bus station. *Id.* at 575. At trial, McLaurin testified about the petitioner's plot and motive for killing the victim and subsequent admission of the robbery and murder. McLaurin also provided evidence linking the petitioner to stolen cocaine and money shortly after the murder. The prosecutor highlighted the importance of McLaurin's testimony in his closing argument and urged the jury to request a read back of McLaurin's testimony. *Id.* at 579.

The petitioner claimed that the prosecution failed to disclose a leniency deal extended to McLaurin under which McLaurin received immunity for any crime he committed on the weekend of the murder in exchange for his testimony against the petitioner. The Ninth Circuit found that failure to disclose the deal, if it

existed, satisfied the *Brady* materiality standard because the deal would have provided "powerful and unique impeachment evidence" demonstrating that McLaurin had an interest in fabricating his testimony. *Id.* at 579. It explained that McLaurin's testimony that the petitioner confessed to the murder and robbery was "probably the most probative and damaging evidence" that was admitted against the petitioner. *Id.*

In *Silva*, the petitioner was convicted of a double homicide, kidnaping, robbery, and related gun offenses. The petitioner, and two accomplices, Joe Shelton and Norman Thomas, kidnaped a young college couple. *Silva*, 416 F.3d at 982-83. Both victims were eventually killed. *Id.* at 983. According to Thomas, Shelton had, on two occasions, described how the petitioner shot and killed the victims. *Id.* at 983. Thomas reported that the petitioner simply looked on and smiled as Shelton described the murders. *Id.* Thomas became the prosecution's central witness. The prosecutor agreed to drop murder charges against Thomas, provided that he testify against the petitioner and agree to forego a psychiatric examination. *Id.* at 984. Apparently, Thomas had been involved in a motorcycle accident several years earlier and had suffered severe brain damage. *Id.* The prosecutor explained to Thomas's counsel that a psychiatric evaluation would "supply ammunition to the defense." *Id.* Although Thomas testified about the dismissal of the murder charge, the defense was not informed that Thomas had agreed to prosecutor's request that he undergo a psychiatric examination. *Id.* The Ninth Circuit found that the prosecution's failure to disclose this information violated *Brady*. The Court of Appeals reasoned that the violation was material because

Thomas' testimony was the most specific and powerful evidence identifying the petitioner as the killer and describing how the murders took place. *Id.* at 987. Most importantly, the court found that the petitioner's adoptive admission of Shelton's account of the murder was "tantamount to a confession." *Id.*

The facts of this case are distinguishable from those which resulted in the granting of habeas relief in *Horton* and *Silva*. First, unlike those two cases, McLoren did not testify that the Petitioners had confessed to the underlying offense. As the Ninth Circuit noted in reaching its conclusion in both *Horton* and *Silva*, "'A confession is like no other evidence. Indeed, the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him.'" *Horton*, 408 F.3d at 580 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 290 (1991)); *Silva*, 416 F.3d at 987 (quoting *Fulminante*).

Moreover, unlike the witnesses in *Horton* and *Silva*, McLoren was not involved in the underlying crime or its aftermath. McLoren was the victim, and his testimony was simply descriptive of the conduct of the Petitioners which resulted in the fight that led to Farris' death. In addition, McLoren did not have the same incentive to fabricate his testimony as did the witnesses in *Horton* and *Silva*. McLoren was not a co-conspirator, confidante, or friend of Petitioners. The immunity agreement was not conditioned upon him testifying at trial, let alone giving favorable testimony to the prosecution. As a victim, he was not facing the same criminal charges as Petitioners (attempted robbery, burglary, assault or murder) and he did not have any other pending felony charges. Key parts of McLoren's testimony were corroborated by other

independent evidence and McLoren was significantly impeached at trial. It is not reasonably probable that the jury would have been greatly influenced by the immunity letter in light of McLoren's admitted lies to police and his history of drug use and criminal activity. Finally, unlike the circumstances in *Horton* and *Silva*, there was no question about who stabbed the victims or whether all four Petitioners were at the fort at the time of the stabbings occurred.

Although the prosecutors' failure to disclose the immunity agreement was error, Petitioners have not demonstrated, and the Court cannot find, that the non-disclosure of the immunity agreement was material within the meaning of *Brady* in that it does not undermine confidence in the verdict. It must be remembered that the contested issue in the case was whether Petitioners went to McLoren's with the intent to rob him. It simply cannot be said that there is a reasonable probability that the impeachment of McLoren with the immunity agreement, in light of all the other evidence, would have led to a different result on the issue of Petitioners' purpose, motive, and intent on the night of the incident. Indeed, the impact of the immunity agreement on McLoren simply resulted in his changing his statement concerning what Petitioners had attempted to steal, not the fact that theft was the motive. Because the content of the undisclosed immunity agreement cannot be said to put the "whole case in such a different light as to undermine confidence in the verdict," *Silva*, 416 F.3d at 986, Petitioners are not entitled to relief on this claim.

C. Additional *Brady* Claims

Petitioners also allege that the prosecution improperly suppressed evidence of an underground

safe, Katren Anderson's interview, and McLoren's August 2005 marijuana arrest. These claims will be discussed in order.

1. Floor Safe

Petitioners claim that the prosecution suppressed evidence of the existence of a floor safe in McLoren's fort and whether that safe had been removed.[19] Micah told police investigators in an interview that McLoren had "an underground safe somewhere" inside the fort where he kept marijuana (Hein Pet., Ex. G at 37). Stacey Williams, McLoren's girlfriend, stated that there was a safe in the fort where McLoren would hide marijuana from his mother, but she did not know if it was there on May 22, 1995, since McLoren had rearranged the fort's interior a few days earlier. (Hein Pet., Ex. W at 233). Petitioners also point to handwritten notes by Semow that show a chart with names down the side and "drawer" and "safe" as column headings. (Hein Pet., Ex. BB).

During McLoren's interview at the hospital on May 26, 1995, the detectives referred to a floor safe that they had discussed earlier (presumably in an unrecorded conversation). Detective Tauson asked if anyone mentioned the safe during the incident on May 22, 1995 and McLoren replied that no one had. (Miliotti Pet., Ex. 6 at 37). In a civil case brought by Farris' parents against McLoren after the criminal trial, McLoren testified that he had a floor safe in the fort where he kept marijuana. (Hein Pet., Ex. Y at 242). Detective Tauson testified at the civil trial that he did not find a safe during his walk-through of the fort. (Miliotti Pet., Ex. 20 at 112).

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[19] Micah Holland does not assert this claim.

Petitioners argue that both the existence of the safe and whether it was removed from the fort was not disclosed to the defense. (*See* Hein Traverse at 23). The record shows, however, that the existence of the safe was disclosed. All police interviews in which the safe was mentioned were turned over to the defense. Furthermore, Curt Leftwich, Miliotti's defense counsel, questioned McLoren about the safe during cross-examination:

Q One of the other places that you kept money was in a safe inside the fort?

A Sometimes.

Q On May 22nd of last year did you have money in the safe?

A No.

(33 RT 3771). Therefore, Petitioners have not shown that the existence of the safe was not disclosed to defendants.

Petitioners also cannot show that the safe was removed from the fort. The only support for this contention is Detective Tauson's testimony at McLoren's civil trial that he did not see the safe during a walk through of the fort. Contradicting this evidence is McLoren's testimony that he showed police the safe during the walk through and Tauson's questioning of witnesses about the safe. Since Petitioners have offered no evidence that the safe was actually removed, they have not shown that any evidence was suppressed under *Brady*.

2. Katren Anderson Interview

Petitioners next contend that the prosecution suppressed a police interview with Katren Anderson

conducted on October 10, 1995.[20] (Hein Pet. at 38; Miliotti Pet. at 75). Anderson did not testify at trial. Anderson gave Jason Holland a ride to the park on May 22, 1995, and saw all four Petitioners and Velardo later at a friend's house. On April 2, 1996, after the trial had started, the prosecutors disclosed Anderson's written statement from the interview. (Hein Pet., Ex. T). The statement contained the following: "Chris said we are going to get some bud."[21] (Id.). Defense counsels' request for Tauson's notes from the interview was denied. However, during an *in camera* hearing on April 10, 1996, Tauson summarized the interview:

> I asked, "Do you know anything about that particular day?" She says, "Yeah. I picked up Jason around 2:00 o'clock [sic], dropped him off at a park. We went to another girl's house. Then the other four come over, and they say they were going to go buy some bud. Then I never saw or heard about them again until I heard about the murder the next day." Nice to know but not a lot of help to me.

(Hein Pet., Ex. U at 212-13).

Petitioners contend that Anderson's statement that Petitioners were planning to "buy" marijuana was exculpatory and that failure to disclose it was a *Brady* violation. Petitioners' claim has no merit. The prosecution turned over Anderson's signed statement during trial. *Brady* does not require disclosure before trial, only that disclosure "must be made at a time when disclosure would be of value to the accused." *United States v. Davenport*, 753 F.2d 1460, 1462 (9th

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[20] Only Hein and Miliotti assert this claim.

[21] "Bud" is a slang term for marijuana.

Cir. 1985); *see also Gantt v. Roe*, 389 F.3d 908, 912 (9th Cir. 2004).

Here, Petitioners received the evidence only a few days into trial and before Tauson had testified. Petitioners could have used this information to call Anderson as a witness or in their cross-examination of Tauson. *See United States v. Gordon*, 844 F.2d 1397, 1403 (9th Cir. 1988) (holding no *Brady* violation since defendants could have recalled witnesses after disclosure). Furthermore, Petitioners cannot allege a *Brady* violation based on Detective Tauson's interview notes because the trial judge determined that they were privileged and not subject to disclosure. (Hein Pet., Ex. U at 218). Therefore, there was no *Brady* violation based on the failure to disclose the Anderson interview.

3. McLoren's Marijuana Arrest During Trial

Petitioner Hein contends that the prosecution suppressed evidence that McLoren was arrested for possessing and being under the influence of marijuana on August 8, 1995. (Hein Pet. at 37-38; *see also* Hein Pet., Ex. 5). Hein's trial attorney, Jill Lansing, stated in a declaration on September 17, 2002, that she did not recall receiving McLoren's arrest report, and that if she had, she would have used it in her examination of McLoren. (Hein Pet., Ex. Q). It appears that the arrest report was among the discovery items listed by D.D.A. Semow on September 15, 1995, a list which included the immunity letter. (1 RT 100A).

However, even if Petitioner can show that the arrest report was not disclosed by the prosecution, Petitioner cannot show that it was material under *Brady*. The arrest showed that McLoren continued to

use marijuana after Farris' death. However, McLoren testified at trial about his regular use of marijuana. In addition, McLoren admitted that he had used marijuana before an unexpected court appearance on January 4, 1996, several months after his arrest. Given that McLoren's use of marijuana was brought out during the direct and cross-examination of McLoren, evidence of the August 1995 arrest would not have significantly added to the impeachment such that non-disclosure would create a reasonable probability that the result of the proceeding would have been different.

Hein contends that the arrest was material because it shows that McLoren was arrested but not prosecuted for his marijuana possession. However, Petitioner has not shown that McLoren was not prosecuted or that the failure to prosecute was related to this case rather than part of an ordinary diversion program. Therefore even in combination with the immunity agreement, there was not a reasonable probability of a different result had evidence of the arrest been disclosed. Because Petitioner cannot show that the arrest report meets the materiality standard under *Brady*, no relief is warranted on this claim.

IV. Knowing Use of False Testimony and Argument

It is well established that "the state may not use false evidence to obtain a criminal conviction." *Napue v. Illinois*, 360 U.S. at 269; *see also Miller v. Pate*, 386 U.S. 1, 7 (1967); *Brown v. Borg*, 951 F.2d 1011, 1015 (9th Cir. 1991). Deliberate deception of a judge and jury is "inconsistent with the rudimentary demands of justice." *Mooney v. Holohan*, 294 U.S. 103, 112 (1935). In addition, the state violates a criminal defendant's right to due process of law when, although not

soliciting false evidence, it allows false evidence to go uncorrected when it appears. *Hayes*, 399 F.3d at 978 (citing *Alcorta v. Texas*, 355 U.S. 28, 78 (1957)).

Likewise, a prosecutor has a constitutional duty to correct the false impression of facts. *United States v. LaPage*, 231 F.3d 488, 492 (9th Cir. 2000). "It is of no consequence that the falsehood bears upon the witness' credibility rather than directly upon the defendant's guilt" because "[t]e jury's estimate of truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness that a defendant's life or liberty may depend." *Hayes*, 399 F.3d at 986 (citing *Napue*, 360 U.S. at 269).

Thus, a species of *Brady* error occurs when "the undisclosed evidence demonstrates that the prosecution's case included perjured testimony and that the prosecution knew, or should have known, of the perjury." *Agurs*, 427 U.S. at 103. To prevail on such a claim, a petitioner must establish that the prosecutor knowingly used perjured testimony, or failed to correct what he subsequently learned was false testimony, and that the falsehood was material. *Id.*, *see also Mooney*, 294 U.S. at 110.

A different and less strict standard of materiality than that used in *Brady* is applied when the prosecutor has knowingly used perjured testimony or has knowingly failed to disclose that testimony used to convict a defendant was false. *Agurs*, 427 U.S. at 103-04; *Giglio*, 405 U.S. at 154. When a prosecutor fails to correct or uses false testimony, a conviction is fundamentally unfair, and must be set aside, if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. *Agurs*, 427

U.S. at 103-04; *Kyles v. Whitley*, 514 U.S. at 433 n.7.[22] Under this materiality standard, "the question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Hayes*, 399 F.3d at 984 (quoting *Kyles*, 514 U.S. at 434.) This is a less stringent standard of materiality than that used in *Brady*, because it "involve[s] a corruption of the truth-seeking function of the trial process." *Agurs*, 427 U.S. at 104. Materiality in this context "does not require a showing that the defendant would have been acquitted had the suppressed evidence been disclosed, or that disclosure would have reduced the quantum of inculpatory evidence below that required to convict the defendant." *Silva v. Brown*, 416 F.3d at 986 (citing *Kyles*, 514 U.S. at 434-35). Moreover, materiality is measured in terms of the collective effect of the suppressed evidence on the trial, not "item by item." *Kyles*, 514 U.S. at 436; *see also Hovey v. Ayers*, 458 F.3d 892, 921 (9th Cir. 2006) (considering the cumulative effect of prosecutorial conduct within a *Brady/Napue* materiality analysis); *Barker v. Fleming*, 423 F.3d 1085, 1094 (9th Cir. 2005) (materiality of withheld evidence must be considered cumulatively in determining whether non-disclosure violated the prosecution's *Brady* obligation). When the

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[22] Although perjury claims are usually considered outside of the *Brady* context, lower courts continue to find that the *Agurs* standard applies to *Brady* claims regarding false testimony. *See, e.g., Hayes v. Brown*, 399 F.3d 972, 984 (9th Cir. 2005); *Benn v. Lambert*, 283 F.3d 1040, 1058 n.11 (9th Cir. 2002); *Byrd v. Collins*, 209 F.3d 486, 517 (6th Cir. 2000); *United States v. Huddleston*, 194 F.3d 214, 220 (1st Cir. 1999); *but see United States v. Gotti*, 171 F.R.D. 19 (E.D.N.Y. 1997).

Supreme Court has declared a materiality standard as it has for this type of constitutional error, there is no need to conduct a separate harmless error analysis." *Hayes*, 399 F.2d at 984.

There are two allegations of use of false testimony: The first and more significant allegation involves the testimony of McLoren and is associated with the failure to disclose the immunity agreement. The second relates to the testimony of Alyce Moulder. These claims will be discussed in turn.

A. False Testimony and Argument Relating to Immunity Agreement and Credibility[23]

At trial, when McLoren was questioned about his motivation for testifying, he cited his desire "to get these guys that stabbed me and killed my friend" and his grandmother's advice to "just to take the drug charge and just bust them." (32 RT 3649-51). Although he testified on redirect examination that he felt uncomfortable talking about his marijuana dealing, he explained that his attorney had advised him that he would not be able to "get" Petitioners until he told the whole truth.[24] (33 RT 3923-24).

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[23] This false testimony claim could be analyzed along with the other allegations of prosecutorial misconduct. However, because the false testimony/argument claim substantially arises out of the failure to disclose the immunity agreement, it will be analyzed separately.

[24] The following exchange occurred on redirect:

Q Did there come a time when you felt ready to tell the truth about your involvement with marijuana, the extent of your dealing in marijuana, the extent of your use of marijuana to the authorities?

A Yes.

Q What brought that about?

On cross-examination, McLoren was questioned about whether he received immunity with respect to his involvement with marijuana. (32 RT 3710). McLoren responded that on May 26, 1995, Detective Tauson told him that "they didn't have an interest in prosecuting [him]."[25] (32 RT 3710). Defense counsel questioned him further:

Q And what did you take that to mean?

A That I wasn't the priority.

A My lawyer told me that I wasn't going to be able to get these guys until I tell the whole truth.

Q Who did you talk to first from law enforcement? Either a particular D.A. or anyone else where you first - for the first time felt that you could be open about yourself and the things that you had done in your life?

A Jeff Semow.

Q. Was that after your conversation with your lawyer?

A Yes.

. . . .

Q How did it feel to talk openly about [the marijuana]?

A I think it made me real uncomfortable.

Q You didn't know for sure whether you could trust Mr. Semow?

A Yes.

Q Did you continue to talk about it?

A Yes.

. . . .

Q Do you still feel uncomfortable talking about it?

A Somewhat.

Q Why are you talking about it anyhow?

A Because it's more important to get these guys than drugs.

(33 RT 3924).

[25] This assurance by Tauson was not included in the recorded portion of the interview. (*See* Hein Pet., Ex. I).

Q That you wouldn't be prosecuted; is that right?

A Not that I wouldn't be, that I probably wouldn't be. They reserved the option.

Q But they suggested to you that that probably wasn't going to happen; is that correct?

A Yes.

Q And at that point you introduced for the first time the idea that this was about stealing marijuana; is that correct?

A Yes.

(32 RT 3710).[26] McLoren also testified that his lawyer did not give him any assurances that he would not be prosecuted and that he believed that what he said to the investigating officers could be used against him. (34 RT 4070-71).

Petitioners assert that McLoren gave false testimony when he testified that he could still be prosecuted for selling marijuana, denied receiving immunity, and suggested that he was testifying against Petitioners primarily for altruistic reasons. In particular, Petitioners rely on the following aspects of McLoren's testimony: the prosecution reserved the option to prosecute him for selling marijuana (32 RT

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[26] McLoren's testimony that he told Detective Tauson on May 26, 1995 that he had been selling marijuana was incorrect. (32 RT 3648). Semow also incorrectly stated during opening statement that McLoren first disclosed his involvement with marijuana on May 26th. (22 RT 2162-63). McLoren later acknowledged, however, that he had not been forthcoming about his marijuana dealing on May 26th. (33 RT 3747, 3818, 3852). The inconsistency in McLoren's testimony was addressed on redirect examination by the prosecutor and discussed in defense counsel's closing arguments. (44 RT 3922-23, 6029-31).

3710); he did not receive any assurances that he would not be prosecuted (34 RT 4070-71); his statements to investigating officers could be used against him (34 RT 4070); his grandmother told him to just take the drug charge and "bust" Petitioners (32 RT 3649); it was more important to "get [the] guys that stabbed and killed [his] friend" than to protect himself (32 RT 3650-51); on July 10, 1995, he admitted to his involvement in selling marijuana because his lawyer told him that he would not be able to "get" Petitioners until he told the "whole truth" (33 RT 3923); and it was more important to "get [Petitioners] than drugs" (33 RT 3923-24). Considering the substance of the July 10, 1995 letter from Semow, McLoren's statements suggesting that he had not received immunity was clearly false. (34 RT 4070-71).

In addition, D.D.A. Michael Latin also made statements in closing rebuttal argument which gave the impression that McLoren had received no promises prior to his testimony. In closing argument, Latin referred to McLoren's honesty (46 RT 6300) and stated that by testifying, McLaren "opened himself up to embarrassment, scorn, ridicule, contempt and **criminal liability**, but he did it because he understood that that is what it takes to tell the truth and be believed." (45 RT 6219) (emphasis added).[27] Thus, McLoren's general denial of any immunity agreement, when coupled with

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[27] In addition, D.D.A. Semow told the jury in his initial closing argument that McLoren was a "very powerful and credible witness" (44 RT 5914), "painfully honest" (44 RT 5923), and the "model of a perfect witness" (Id.). These statements also form the basis of one of Petitioners' prosecutorial misconduct claims and will be discussed as an improper vouching claim in section V.A. of this Report.

the prosecutor's emphasis upon his altruistic motivation for testifying, can be characterized for purposes of this analysis as false evidence of which the prosecutor knew or should have known and which the prosecutors did not act upon by bringing the immunity agreement to the attention of the court and defense counsel. *See Napue*, 360 U.S. at 269; *United States v. LaPage*, 231 F.3d 488, 492 (9th Cir. 2000) (observing that when perjury occurs, many prosecutors interrupt their own questioning to work out with the court how to inform the jury that the testimony is false).[28]

Even though the Court finds that the prosecution condoned and then made use of false/misleading testimony, this finding is not sufficient to warrant habeas relief. The Court must also find that the false testimony was material. As stated earlier, the test of materiality is whether there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. *Agurs*, 427 U.S. at 104.

In the context of all of the evidence and the record as a whole, the Court finds that Petitioners have not established that there was any reasonable likelihood that the alleged false testimony and argument could have affected the jury's judgment. *Giglio*, 405 U.S. at 154. Like the failure to disclose the immunity agreement itself, the challenged testimony focused on

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[28] The Court notes that although McLoren was the primary prosecution witness to testify about Petitioners' attempt to commit robbery and burglary, the immunity given to McLoren did not require that McLoren testify at trial nor was it conditioned upon McLoren conforming his testimony to his statement made on July 10, 1995. McLoren was free to change his statement about Petitioners' intent to steal. Thus, it can be argued that McLoren's testimony at trial about his motivation for testifying was not false, but merely misleading with respect to the immunity agreement.

the motivating factors behind McLoren's trial testimony. As stated earlier, McLoren consistently reported that Petitioners came to the fort to rob him. The only variation was in the objective of the theft, changing from electronic equipment to video games and finally to the marijuana. While McLoren admitted that marijuana was involved after receiving the assurances he would not be prosecuted for selling marijuana, the key aspect of McLoren's testimony—that Petitioners attempted to rob him—was clearly not affected by the grant of immunity.

Petitioners contend that McLoren's false testimony served to improperly enhance his credibility and that their ability to challenge his statements were obstructed by suppression of the immunity agreement. However, even if Petitioners had been able to confront McLoren with the immunity agreement, it is not reasonably likely that any cross-examination or additional argument on the subject would have added significantly to the defense, because the jury was already aware of the basic information which undermined McLoren's credibility. Indeed, most of the same ingredients for attacking McLoren's credibility had already been brought out. McLoren testified that Detectives Neumann and Tauson told him that they were interested in convicting Petitioners for the murder and were not interested in prosecuting McLoren for selling marijuana. (32 RT 3648, 3710, 3749-50). Although McLoren stated that he did not receive any assurances against prosecution, he admitted that he told D.D.A. Semow about his dealings in marijuana only after he had retained a lawyer to protect him against prosecution and his lawyer instructed him to tell the whole truth. (33 RT 3818, 34

RT 4069). This was emphasized by the defense in closing argument. (RT 5986-87). Thus, the jury was aware that McLoren was initially untruthful and changed his testimony only after retaining counsel to deal with the marijuana issue.

Moreover, McLoren's testimony that Petitioners attempted to rob him, admittedly the key issue in the case, was supported by substantial corroborating evidence. For example, Petitioners' entry onto McLoren's property was unusual and suspicious. McLoren testified that rather than enter his yard through the driveway, Petitioners "hopped" over his fence. Micah Holland, who was the first to reach the fort, had a "crazy expression on his face" and did not respond when McLoren greeted him. (32 RT 3574). Instead, Micah just walked straight into the fort. (32 RT 3578). Jason Holland confirmed McLoren's description of these events. (38 RT 4887-89). Petitioners outnumbered McLoren and Farris two to one, which increased the intimidating nature of their entry into the fort and subsequent confrontation. The fact that the fight broke out between Micah and McLoren immediately after Petitioners' arrival at the fort is consistent with McLoren's testimony that he was attacked when he refused to give Micah his keys to the drawer where he kept his marijuana. Further, Petitioners' claim that they intended to buy marijuana was undermined by the fact that Chris Velardo, who had been at the fort earlier that day, chose to wait in his truck while Petitioners entered McLoren's property. (22 RT 2194-98). Finally, Petitioners' behavior, both before and after the incident, also gives rise to an inference that Petitioners intended to rob McLoren. About an hour before the incident occurred,

Petitioners were together in Gates Park, when Jason Holland stole the wallet from Alyce Moulder. Immediately after Jason Holland stabbed McLoren and Farris, Petitioners were observed walking towards Velardo's truck, talking among themselves, with smug, self-satisfied smiles on their faces. (34 RT 4093-4101).

It is true that McLoren was the key witness in the prosecution's case against Petitioners. However, Petitioners have not shown that there is a reasonable likelihood that the false testimony concerning McLoren's immunity agreement or his motive for testifying could reasonably be said to have affected the jury's judgment. McLoren reported that Petitioners attempted to rob him long before obtaining the immunity agreement, McLoren's credibility was significantly impeached at trial, and there was corroborating evidence of Petitioners' intent to commit robbery. Without minimizing the misconduct of the prosecution in introducing inaccurate testimony and failing to disclose the immunity agreement, the state court's denial of relief on this claim was not an objectively unreasonable application of clearly established federal law.

The Ninth Circuit's decision in *Hayes v. Brown* does not warrant a different result. In *Hayes*, the petitioner stabbed and killed the manager of the hotel where he was staying. 399 F.3d at 975. The petitioner also took approximately sixty cartons of cigarettes from the hotel's office. After the stabbing, the petitioner told Andrew James, his friend who was also staying at the hotel, that he had killed the manager. According to James, the petitioner had already taken the cigarettes before he told James about the stabbing. *Id.* at 976, 985. James drove the petitioner to the petitioner's

mother's house and unloaded the cigarettes. *Id.* James kept one carton of cigarettes for himself. *Id.* The petitioner was charged with felony first-degree murder.

James agreed to testify against the petitioner in exchange for transactional immunity for his involvement in the homicide and burglary. The prosecutor and James's attorney also negotiated transactional immunity for James on three unrelated felony charges. The attorneys, however, purposely concealed the grant of immunity on other charges so that James could testify that there were no other deals without perjuring himself. *Id.* at 978-80. At trial, James testified that he had not received any deals on his other pending felony charges in exchange for his testimony. *Id.* at 979. The prosecutor also told the trial judge that there were no other immunity agreements. *Id.* at 979-80.

The Ninth Circuit found that the prosecutor's actions amounted to knowing presentation of false evidence even though James did not commit perjury. *Id.* at 980-81. Using the "any reasonable likelihood" standard, the court considered the omission to be material because James was the only witness who testified that the petitioner confessed to the murder. *Id.* at 985-86. It explained that without James' testimony, "there was only circumstantial evidence of the burglary, and only inference as to whether [the petitioner] killed [the manager.]" *Id.* at 986.

This case differs from *Hayes* in terms of both the substance and the seriousness of the error. *Hayes*, like *Silva* and *Horton*, involved a witness who arguably participated in the offense and who testified that the petitioner had confessed to the crime. Significant

evidence of an immunity agreement which precluded prosecution for the offense at issue and several other offenses, all which would have greatly impacted upon the witnesses credibility, was not disclosed to the defense. The witness was permitted to testify that there was no such agreement without correction. While the factual scenario is similar, there is a significant difference in degree between the two cases. McLoren was the victim; he was not receiving a benefit for potential liability on the underlying offense; the nature and scope of the conduct for which immunity was granted was presented to the jury; and his testimony did not involve a confession by the defendant.

On examination of the evidence as a whole, Petitioners have not demonstrated any reasonable likelihood that the prosecution's errors could have affected the judgment of the jury. Accordingly, the state court's denial of this claim was not objectively unreasonable.

B. False Testimony of Alyce Moulder

Petitioner Hein alleges that the prosecution knowingly presented false testimony when Moulder testified that Hein approached her with a steering wheel locking device known as "the club" in the parking lot after the wallet theft, yelled obscenities at her, and spit on her van. (Hein Pet. at 31; 27 RT 2941). Petitioner refers to post-trial interviews by private investigators in which Moulder stated that Hein was not the person holding the club. (Hein Pet. at 31). Hein's claim is unpersuasive. Hein has not shown that

Moulder testified falsely.[29] That Moulder may have told Hein's investigators that Hein was not the person with the club, indicates at most an inconsistency in Moulder's statements. *See Murtishaw v. Woodford*, 255 F.3d 926, 958 (9th Cir. 2001) (holding inconsistent testimony does not warrant relief); *United States v. Croft*, 124 F.3d 1109, 1119 (9th Cir. 1997) (stating that fact that witness may have made an earlier inconsistent statement, or that other witnesses have conflicting recollections of events, does not establish that the testimony offered at trial was false); *United States v. Sherlock*, 962 F.2d 1349, 1364 (9th Cir. 1992) (holding that presentation of witnesses with contradictory stories does not equal perjured testimony). Therefore, the state court's determination on this claim was not unreasonable and relief is not warranted.

V. Prosecutorial Misconduct

Petitioners allege several instances of prosecutorial misconduct, including vouching for McLoren's credibility, attacking defense counsels' integrity, misusing gang evidence, misusing evidence of the wallet theft, appealing to the self-interest of the jury, questioning McLoren in violation of the trial court's ruling, and lying during opening statement. (Micah Pet., Att. 3; Jason Pet. at 5; Miliotti Pet. at 78-112; Hein Pet. at 16-33, 45-64). The California Court of Appeal addressed all allegations of prosecutorial misconduct collectively. The court specifically found that D.D.A Semow's questioning of Jason about Gumbys, despite the Courts order to the contrary, and D.D.A. Latin's

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[29] Petitioner Hein refers to Exhibits KK and LL to support this contention. However, these exhibits are not included in the exhibits lodged by Hein.

rebuttal argument attacking the integrity of the defense, his references to gang activity, and his statements concerning the character of Petitioners amounted to misconduct. The court stated: "Such conduct was unnecessary, professionally questionable and highly risky. It was misconduct." (Cal. Ct. App. at 11). The court held, however, that reversal was not warranted given the length of the trial, the nature of the arguments, the trial court's rulings sustaining defense objections and the curative instructions to the jury. (Cal. Ct. App. at 11-12). The court cited the "overwhelming" evidence against Petitioners and the "unpersuasive" defense evidence in support of its decision finding the misconduct harmless. (Cal. Ct. App. at 12).

A federal court cannot grant relief based solely upon the existence of prosecutorial misconduct; the misconduct must violate the petitioner's constitutional rights. *Smith v. Phillips*, 455 U.S. 209, 220 (1982). Even if a prosecutor's conduct is egregious, habeas relief can only be granted if the conduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974); *see also United States v. Simtob*, 901 F.2d 799, 806 (9th Cir. 1990) (holding reversible misconduct occurs when the conduct at issue "appears likely to have affected the jury's discharge of its duty to judge the evidence fairly"). Habeas relief may only be granted when "the integrity of the proceeding was so infected that the entire trial was unfair." *Hayes v. Woodford*, 301 F.3d 1054, 1074 (9th Cir. 2002) (quoting *Hardnett v. Marshall*, 25 F.3d 875, 879 (9th Cir. 1994)). Determination of whether constitutionally

impermissible acts of misconduct occurred requires the reviewing court to examine the entire proceedings and place the alleged misconduct in context. *United States v. Robinson*, 485 U.S. 25, 33 (1988).

A. Vouching for McLoren's Credibility

Petitioners' first claim is that D.D.A. Semow impermissibly vouched for the credibility of McLoren in the initial closing argument by referring to McLoren as, among other things, a "very powerful and credible witness" (44 RT 5914), "painfully honest" (44 RT 5923), and the "model of a perfect witness" (Id.). (*See* Miliotti Pet. at 78-79). As noted, this argument parallels the false evidence/argument claim discussed in the previous section.

Respondent's initial contention that Petitioners have waived their vouching claim by failing to object at trial is erroneous. *Wainwright v. Sykes*, 433 U.S. 72, 90-91 (1977). Outside of the presence of the jury on May 9, 1996, defense counsel moved for a mistrial based on improper argument, including "vouching for the integrity of the prosecution." (45 RT 6222).

"As a general rule, a prosecutor may not express his opinion of the defendant's guilt or his belief in the credibility of government witnesses." *United States v. Molina*, 934 F.2d 1440, 1444 (9th Cir. 1991). Vouching occurs when the prosecution places the prestige of the government behind a witness through personal assurances of the witness's veracity. *United States v. Weatherspoon*, 410 F.3d 1142, 1147 (9th Cir. 2005); *United States v. Necoechea*, 986 F.2d 1273, 1276 (9th Cir. 1993). Vouching is "especially problematic in cases where the credibility of the witnesses is crucial." *Molina*, 934 F.2d at 1445. However, prosecutors must have reasonable latitude to make closing arguments

and can argue reasonable inferences based on the evidence. *Id.* at 1445.

The Court has reviewed D.D.A. Semow's remarkably short closing argument. (RT 5901-24). While the challenged statements were made and arguably exceeded the bounds of proper argument, it cannot be said that these three brief comments about McLoren, in the context of the mild closing argument focused on the relevant law and facts, "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly*, 416 U.S. at 643. The decision of the state courts was not an objectively unreasonable application of Donnelly. Therefore, relief is not warranted on this claim.

B. Attacking Integrity of Defense Counsel

Petitioners allege that D.D.A. Latin engaged in misconduct in his rebuttal argument by attacking the integrity of defense counsel. (Micah Pet., Att. 3 at 4-5; Jason Pet. at 5; Miliotti Pet. at 84-92; Hein Pet. at 48-53). In his argument Latin stated that "one side presented a very clear and pure picture of what happened, and the other side did some very dirty things, dishonest. The defense in this case was dishonest." (45 RT 6169). The trial court sustained an objection and the prosecutor stated that he was referring to defense witnesses. (Id.). Latin also stated that he did not "appreciate cheap lawyer tricks." (45 RT 6195). After referring to the "choirboy" appearance of Hein, he stated that "we are here about the truth.... [T]hey are presenting you with a false image. They are trying to create an illusion." (45 RT 6197). Defense counsel objected and the court admonished Latin to stick to the evidence and not refer to the lawyers. Latin again stated that he was

referring to Petitioners and not their counsel. (Id.). Petitioners also contend that the prosecutor compared the integrity of the government with the dishonesty of the defense. (*See* 45 RT 6203-04, 13).

The trial court denied defense counsels' motion for a mistrial based on Latin's statements. The court concluded that the prosecutor was within the scope of rebuttal argument. (46 RT 6265). The court warned Latin however that "[t]o infer from that the lawyers here, in fact, engaged in some wrongdoing is not only unfair, but very close, in my considered opinion, to misconduct." (46 RT 6266). The court also admonished the jury: "In the course of argument yesterday, there was a reference made to the attorneys with reference to misconduct. I want to make sure you understand that there is no evidence at all in this case on any issue of any misconduct by any of the lawyers involved in this particular case, all right?" (46 RT 6270-71). The prosecution did not make other challenged remarks after this warning from the judge.

The California Court of Appeal concluded that while the prosecutor's comments rose to the level of misconduct, they did not prejudice Petitioners' right to a fair trial. (Cal. Ct. App. at 12). This was not an objectively unreasonable application of federal law. The prosecutor explained himself to the jury after making two of the comments, was admonished by the court and did not make any other improper comments. The trial court also instructed the jury about the challenged statements. Although the jury's impression of the defense counsel's integrity was important to the case, the court's actions remedied any possible harm. Therefore, relief is not warranted on this claim.

C. Questions About Gang Evidence

Petitioners contend that the prosecutor engaged in misconduct by questioning Jason Holland about gang membership after the trial court had limited its admissibility. (Hein Pet. at 47; Miliotti Pet. at 104; Jason Pet. at 5; Micah Pet., Att. 3). After a four-day pre-trial hearing (17 RT 1449-21, 2057), the trial court ruled that there was insufficient evidence to show that Petitioners were gang members and that gang evidence would be limited.[30] (21 RT 2036). During cross-examination of Jason Holland, the prosecutor asked if he heard Micah say something about Gumbys to McLoren. Jason denied hearing Micah reference Gumbys. (40 RT 5263-64). Then the following exchange occurred:

Prosecutor:	Do you know what Gumbys is?
Salzman:	Objection. Relevance, your honor.
Court:	Sustained.
Prosecutor:	You know what Gumbys is?
Leftwich:	Your honor, objection.
Salzman:	Objection. Would you kindly admonish the district attorney to listen to the court's ruling.
Court:	Sustained.
Prosecutor:	Are you a member of Gumbys?
Salzman:	Objection.

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[30] The trial court limited the evidence to testimony that Micah asked McLoren "you want to start shit with Gumbys, ese?" (32 RT 3591), when he entered the fort, and a definition of Gumbys to show that Micah's statement caused fear in McLoren. (*See* 40 RT 5289).

Court: Sustained.

(40 RT 5264). The court heard argument about the consequences of the questions outside of the presence of the jury and denied a motion for a mistrial. (40 RT 5272-95). The court concluded that the questions were improper, but asked in good faith. (40 RT 5295). The court admonished the jury that the questions were improper and "that there is nothing in the evidence that has been presented in the trial which would establish that any of these defendants are members of this gang called Gumbys." (40 RT 5300). The prosecutor also referred to Petitioners' actions as "group activity" in his closing argument. (45 RT 6202).

The California Court of Appeal concluded that the Gumbys questions were improper, but that the sustained objections and admonition by the trial court negated any potential prejudice. (Cal. Ct. App. at 10-11). This Court agrees that the prosecutor's questions crossed the line of proper behavior. However, the jury was already aware of the existence of a gang called Gumbys and the prosecutor's questions did not likely create any more of an inference that Petitioners were members of Gumbys than the previous evidence about the gang. Moreover, the trial court provided a specific admonition about the questions and the fact that they were not evidence. The prosecutor's reference to "group activity" in closing argument did not connect their activity to a gang. The jury was also instructed several times that statements in closing argument were not evidence. Petitioner cannot show that fundamental unfairness resulted from the Gumbys questions or reference to "group activity." Therefore, the court of appeal's determination was not unreasonable and no relief is warranted on this claim.

D. Improper Questioning About Wallet Theft

Petitioners contend that the prosecutor asked improper questions about the theft of Moulder's wallet, specifically that the wallet theft was used as improper character evidence to show Petitioners' propensity to commit crimes.[31] (Hein Pet. at 53-56; Jason Pet. at 5). The prosecutor argued that both the wallet and marijuana theft were about the "thrill of stealing": "It wasn't about marijuana. It's not about that. It's about power. It's about fun. It's about having nothing to do but go around and act like a bully." (Hein Pet. at 53). When describing the theft, the prosecutor stated, "It was like a pack of wolves going to a river for a drink and seeing a bunny rabbit along the way." (45 RT 6288). The court overruled defense counsel's objection. (Id.). The court later admonished the jury:

> If you hear references, for example, like things of wolf pack or things of a nature which were objected to, I want you to understand that there is no insinuation here that, in fact, that term has any evidentiary value whatsoever with reference to this case.... I did not sustain [the objection] because I didn't think it was used in the pejorative sense. It was rather an illustration.

(46 RT 6328).

The California Court of Appeal concluded that these statements did not warrant reversal. (Cal. Ct. App. at 12). Although the prosecutor's statements were improper, they did not rise to the level of egregiousness required to render the trial fundamentally unfair. The trial court reminded the

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[31] Only Jason Holland and Hein assert this claim.

jury that the prosecutor's argument was not evidence and specifically referenced the "pack of wolves" statement. The state court's determination denying relief on this issue was not unreasonable.

E. Appealing to Self-Interest of Jurors

Petitioners allege that D.D.A. Latin impermissibly gave the jury a personal stake in the outcome of the trial by stating: "[Petitioners] tried to steal again. They tried to steal the truth from you in this trial. They want to have a reason to smile again. You, ladies and gentlemen, are the only ones that can prevent that. You decide who gets the last laugh here. All you have to do is find the truth, and I know that you already know what it is." (46 RT 6305). The state court determined that this did not warrant habeas relief.

Jurors must decide cases based solely on the evidence presented. *Smith v. Phillips*, 455 U.S. 209, 217 (1982). The prosecutor's comments only briefly inferred that the jurors had a personal stake in the trial, but concluded with instructions to "find the truth." This conduct was not egregious and Petitioners have not shown that it affected the jury's duty to decide the case on the evidence. It was merely one overzealous statement by the prosecutor. Relief is not warranted on this claim.

F. Questioning McLoren in Violation of Court's Ruling

Petitioner Hein alleges that the prosecutor engaged in misconduct by questioning McLoren about repercussions from "snitching" on Wiley about the gun theft in violation of the trial court's ruling. (Hein Pet. at 46; 33 RT 3909-16). The prosecutor's questions pertained to the high schools McLoren attended and fights he was involved in. (33 RT 3909-16). The

prosecutor received several objections to his questioning in this area, most of which were sustained. The court warned the prosecutor:

> Mr. Latin, we spent a great deal of time outside the jury's presence to avoid bringing in evidence here which I don't believe is properly brought out the way the questions are elicited. That's why you're drawing objections. You have to focus it, and I don't see the whole thrust of this line of questioning other than answering Mr. Sussman's question "were you in fights before?" The answer was yes, okay?
>
> You can focus it on that, what fights he was referring to without getting into the details of it. That's fair, but I don't want you to be drawing in evidence that we have already had rulings on.

(33 RT 3914-15). The prosecutor asked a few more questions which also received sustained objections before moving on to a different topic. (33 RT 3915-16).

The prosecutor's conduct was not so egregious in this instance so as to warrant relief. He was merely exploring the boundaries of proper questioning based on the scope of defense counsel's cross-examination. The trial court sustained most of defense counsels' objections and the witness did not answer any of the improper questions. The prosecutor's questions themselves did not imply a correct answer or otherwise alert the jury to the specifics of the excluded topic. Moreover, the trial judge admonished the prosecutor to discontinue his expansive questioning in front of the jury. The prosecutor's conduct cannot be said to have infected the trial with unfairness. Therefore the state court's decision denying relief was not unreasonable.

G. Lying During Opening Statement

Petitioner Jason Holland also alleges that the prosecutor lied during opening statement because he told the jury that McLoren first disclosed his involvement with marijuana on May 26, 1995. (Jason Pet. at 5; 22 RT 2162-63). Although the prosecutor's statement was incorrect, the jury was made aware of the inaccuracy in the prosecutor's opening statement. When questioned on cross-examination, McLoren stated that he did not admit to selling marijuana until he met with D.D.A. Semow on July 10, 1995. (33 RT 3818, 3852, 3922-23). Defense counsel also emphasized the inconsistency in McLoren's testimony during closing argument. (44 RT 6029-31). Thus, the error did not so infect the trial with unfairness as to make the resulting conviction a denial of due process. *Donnelly*, 416 U.S. at 643.

VI. Ineffective Assistance of Counsel

Petitioners contend that their attorneys were ineffective in failing to discover and cross-examine McLoren on his immunity agreement, failing to cross-examine McLoren about his marijuana arrest during trial, failing to question McLoren about other issues, failing to introduce fingerprint evidence, failing to clarify Detective Tauson's testimony, failing to introduce evidence of childhood abuse of Jason, and failing to investigate alleged crime scene destruction by the police. (Hein Pet. at 64-65; Miliotti Pet. at 28-61; Jason Pet. at 6a; Micah Pet. at Att. 5). The California Supreme Court denied relief on this claim in its summary denial of the habeas corpus petition on May 12, 2004. Petitioners did not raise this claim on direct appeal.

The Sixth Amendment guarantees the effective assistance of counsel. Claims of ineffective assistance are reviewed under the two-step analysis set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Petitioners must prove that their attorneys' representation was "deficient," in that it fell below an objective standard of reasonableness under prevailing professional norms. *Id.* at 687-88. Scrutiny of counsels' performance must be "highly deferential," and Petitioners must overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689; *see also United States v. Quintero-Barraza*, 78 F.3d 1344, 1348 (9th Cir. 1995). In addition, Petitioners must show that they were prejudiced from counsels' deficient performance. *Strickland*, 466 U.S. at 687, 694. This means that Petitioners must establish a reasonable probability that, but for counsels' errors, the result of the proceeding would have been different. *Visciotti*, 537 U.S. at 22. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 23. "Failure to show either deficient performance or prejudice is sufficient to defeat [Petitioners'] claim of ineffective assistance. Thus, the court need not discuss both components of the test if [a petitioner] fails on either." *Anderson v. Calderon*, 232 F.3d 1053, 1084 (9th Cir. 2000); *see also Strickland*, 466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.").

A. Failing to Cross-Examine McLoren About Immunity

As an alternative argument to their *Brady* claim, Petitioners allege that their counsel rendered ineffective assistance by failing to discover and cross-examine McLoren on his immunity agreement. (Hein Pet. at 64-65; Micah Pet., Att. 5; Miliotti Pet. at 28-47). This Court has already determined above, under the *Brady* analysis, that there was no reasonable probability that the result of the proceeding would have been different had McLoren's immunity agreement been disclosed. Thus, Petitioners cannot establish that they were prejudiced by defense counsels' omission. *Strickland*, 466 U.S. at 694 (requiring a showing of a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different); *see Strickler*, 527 U.S. at 299 (Souter, J., concurring) (discussing similarity between "reasonable probability" materiality standard under *Brady* and prejudice under *Strickland*). Petitioner Miliotti's claim of ineffective assistance fails for the same reason. (Miliotti Pet., Ex. 12 at 77-78).

B. Failing to Cross-Examine McLoren About Marijuana Arrest

Petitioners allege that failure to question McLoren about his August 1995 arrest for possession and being under the influence of marijuana constituted ineffective assistance of counsel. (Hein Pet. at 64-65;[32] Miliotti Pet. at 50-51; Jason Pet. at 6a; Micah Pet., Att. 5; *see also* Hein Pet., Ex. S). Even if Petitioners could show deficient performance, they cannot meet the prejudice

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[32] Hein raises this claim as an alternative to his *Brady* claim regarding the marijuana arrest.

requirement. As discussed above, McLoren testified that he regularly used marijuana and that he had used marijuana before he testified in court on January 4, 1996. The arrest would not have significantly affected the jury's impression of McLoren's marijuana use. Because Petitioners cannot show prejudice, no relief is warranted on this claim.

C. Failing to Cross-Examine McLoren About Previous Burglary

Petitioner Miliotti alleges that his counsel's failure to question McLoren about previous burglaries at his fort constitutes ineffective assistance. (Miliotti Pet. at 51-53). Earlier that year, McLoren's fort was burglarized by people uninvolved in this case. (*Id.* at 51-52). Petitioner argues that this previous burglary predisposed McLoren to anticipating theft by Petitioners. (*Id.* at 52-53).

Even assuming that Petitioner can show that counsel's performance was deficient, Petitioner cannot show prejudice. McLoren testified that Micah pulled on the desk drawer where he kept the marijuana that he sold, demanded the keys, and made threatening remarks. These statements by McLoren are much stronger evidence that he believed Petitioners intended to rob him than his previous experience with burglary of the fort. The state court's determination was not unreasonable and no relief is warranted on this claim.

D. Failing to Cross-Examine McLoren About Statements that Petitioners Attempted to Steal Electronic Equipment

Petitioner Miliotti alleges that his counsel provided was ineffective by failing to question McLoren about his statements to police that Petitioners intended to

steal his electronic equipment. (Miliotti Pet. at 47-50). Petitioner's claim is belied by the record. (32 RT 3746-48). Petitioner has also not shown prejudice. McLoren admitted that his statement about the electronic equipment was false when cross-examined by counsel for Petitioner Hein and Petitioner Micah Holland. (32 RT 3707-11, 3852). Because McLoren already admitted the falsity of his previous statements, Petitioner cannot show that any deficiency in his attorney's cross-examination of McLoren on that topic would have changed the results of the proceeding. No relief is warranted on this claim.

E. Failing to Introduce Fingerprint Evidence

Petitioners allege that their counsel provided ineffective assistance by failing to introduce fingerprint evidence.[33] On the night of the incident, crime scene investigator Susan J. Yount took photographs, collected evidence and conducted a latent fingerprint examination at the fort. (*See* Miliotti Pet., Ex. 17). She did not obtain latent fingerprints from anywhere inside the fort. (*Id.*). Petitioners contend that Yount should have been called as a witness to refute McLoren's testimony that Micah pulled on the handle of his desk drawer by testifying that no fingerprints were found on the drawer handle.

Petitioners have not shown that counsels' decision not to call Yount was deficient. There is no evidence that Yount tested the drawer handle for fingerprints. Moreover, the fact that no usable fingerprints were found *anywhere* in the fort significantly detracts from any evidentiary value provided by the fact that no prints were found on the door handle. Given this

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[33] Petitioner Hein does not join in this claim.

information, defense counsels' decision not to call Yount as a witness was not unreasonable. In addition, given the negligible probative value of the fingerprint evidence, Petitioners cannot show that they were prejudiced. Therefore, the state court's decision denying relief on this claim was not unreasonable.

F. Failing to Clarify Detective Tauson's Testimony

Petitioner Miliotti contends that defense counsel was ineffective when he failed to question Tauson about his interview with McLoren on May 26, 1995. (Miliotti Pet. at 53). During direct examination, Tauson stated that during the interview, McLoren said that Micah came into the fort and pulled on the drawer handle. (37 RT 4645-46). The following exchange then occurred:

> Q: And where in terms of the interview did that take place? Was that at the end when you finally broached the subject of the marijuana or was it at the beginning of the interview?
>
> A: At the beginning.

(*Id.*). In fact, Tauson and McLoren discussed the marijuana found in the fort at the beginning of the interview in an unrecorded conversation. Miliotti challenges counsels' failure to bring out this fact.

Petitioner, however, cannot show prejudice because McLoren himself testified that Tauson brought up marijuana first during the interview. (32 RT 3647). The jury was therefore aware of this fact despite the prosecutor's somewhat misleading question to Tauson. Therefore the state court's determination was not unreasonable and no relief is warranted on this claim.

G. Failing to Introduce Evidence of Childhood Abuse

Petitioner Jason Holland contends that his attorney's failure to introduce evidence of his childhood emotional and physical abuse violated his right to the effective assistance of counsel. (Jason Pet. at 6a). This evidence would have gone to a claim of self-defense to show that Petitioner had an honest but unreasonable belief in the need to use deadly force. (*Id.*). However, at trial, Petitioner did not argue self-defense. (45 RT 6183). Petitioner took responsibility for Farris' death, with his attorney repeating that a "not guilty" verdict was not an option for Petitioner. Instead, Petitioner's theory was that there was not an attempted robbery and that he was only guilty of involuntary manslaughter. (45 RT 6192).

Evidence of childhood abuse was relevant only to a self-defense argument. Trial counsel's decision not to pursue a self-defense argument was a strategic one based on the evidence. Making decisions about defense theories is what counsel is supposed to do. It is not deficient performance. *See Strickland*, 466 U.S. at 689 ("The defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'") (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). The state court's decision denying habeas relief on this claim was not unreasonable.

H. Failing to Investigate Alleged Crime Scene Destruction

Jason Holland contends that his trial counsel was ineffective by failing to investigate allegations of crime scene destruction by law enforcement personnel. (Jason Pet. at 6a). Dr. Anne F. Thiel, a clinical

psychologist, treated Jason Holland and testified at his sentencing hearing. (*See* 55 RT 6998-7042). During a medical appointment, Dr. Thiel's personal physician, Dr. Karel Douglas Vaughan, revealed that two of his other patients were Los Angeles Sheriffs' Department deputies who worked on the Farris homicide. According to Dr. Thiel, these deputies told Dr. Vaughan that they had been instructed by the District Attorney to withhold evidence from the crime scene. (*See* Jason State Pet., Ex. 22). Despite Dr. Thiel's urging, Dr. Vaughan declined to pursue the matter. (*Id.*).

Dr. Thiel relayed this information to trial counsel after the verdict but before sentencing. According to Jason's habeas attorney, his trial counsel, Ira Salzman, stated that he declined to investigate Dr. Thiel's story because it lacked credibility and it "sounded like an Oliver Stone type conspiracy." (Jason, State Pet., Ex. 28). This was not deficient performance by counsel. It was well within the bounds of reasonable trial counsel strategy to decline to pursue Dr. Thiel's unsubstantiated theory of police misconduct. *See Strickland*, 466 U.S. at 689. As Petitioner cannot show that counsel's decision was unreasonable, the state court's determination denying relief was not unreasonable.

VII. Improper Admission or Exclusion of Evidence

Petitioners contend that the trial court both admitted and excluded evidence in violation of their due process rights. Specifically, Petitioners challenge the admission of gang-related evidence and evidence of the theft of Moulder's wallet. They also challenge the exclusion of evidence about McLoren's possible civil

liability, alleging that it violated their Sixth Amendment right to confront witnesses.

A. Gang Evidence

Petitioners first challenge the court's admission of gang-related evidence.[34] (Jason Pet. at 6; Micah Pet., Att. 4; Miliotti Pet. at 125). After a four-day pre-trial hearing, the court ruled that there was not enough evidence to show that any of Petitioners were members of a gang and excluded all evidence to that effect. (21 RT 2035). However, the court ruled that McLoren's testimony that Micah asked "you want to start shit with Gumbys, ese?" was admissible. (21 RT 2021). Because the meaning of "Gumbys" was not common knowledge, the court allowed an expert witness to testify that Gumbys was an "organized local street gang." (36 RT 4462). This testimony was to show Micah's intent and the effect on McLoren, namely, that the statement created fear in McLoren. Fear is a required element of attempted robbery. Cal. Penal Code § 211.

Petitioners argue that the gang evidence was cumulative and that its probative value was outweighed by its prejudice. (*See* Miliotti Pet. at 127). This presents an argument that the state court misapplied state evidence law. On habeas review, a federal court does not consider misapplications of state evidence law unless the application violates a constitutional right. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *Pulley v. Harris*, 465 U.S. 37, 41 (1984). Petitioners also allege a violation of due process. (*See* Jason Pet. at 6). Admission of evidence violates due process if: (1) "there are no permissible inferences the

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[34] Petitioner Hein does not join in this claim.

jury may draw from the evidence," and (2) the evidence is "of such quality as necessarily prevents a fair trial." *Jammal v. Van de Kamp*, 926 F.2d 918, 920 (9th Cir. 1991).

The California Court of Appeal found that the admission of this gang evidence did not present a due process violation: "Absent the expert testimony regarding the local meaning of the word 'Gumbys,' the prosecution would have been left arguing force and fear through the threat of a cartoon character or flexible rubber doll." (Cal. Ct. App. at 22). This interpretation was not unreasonable. The jury could make the permissible inference from Micah's statement that he intended to cause fear in McLoren by referring to a local gang. Furthermore, the evidence was not of such a quality as necessarily prevents a fair trial. The expert's testimony was extremely brief and limited only to identifying Gumbys as a local gang. (36 RT 4458-63). McLoren testified that Micah's statement "intimidated [him] a little more." (32 RT 3591). There was no further testimony about the nature of the Gumbys gang or if Petitioners were members. Given the limited nature of the gang evidence and its legitimate purpose to show fear in McLoren, its admission was not a violation of due process. The state court's determination was therefore not unreasonable and no relief is warranted on this claim.

B. Wallet Theft

Petitioners' next evidentiary claim is that the trial court's admission of evidence about the theft of Moulder's wallet violated their right to due process. (Jason Pet. at 5; Micah Pet., Att. 4; Miliotti Pet. at 114-25; Hein Pet. at 72-80). Petitioners contend that the state court should not have admitted the evidence

under state evidentiary rules and that the evidence was admitted to show their propensity to commit criminal acts. This claim is without merit.

After a pre-trial hearing, the court allowed introduction of evidence of the wallet theft only to show identity and intent.[35] (5 RT 1196A). The California Court of Appeal upheld this decision under state evidence law, noting that "the jury was specifically instructed that such evidence could not be considered to show bad character." (Cal. Ct. App. at 10).

Petitioners' argument that allowing the wallet theft evidence violated state evidence law cannot be considered on habeas review. *Estelle*, 502 U.S. at 67-68. Petitioners also cannot show that the evidence was admitted to show a criminal propensity. The trial court explicitly admitted the wallet theft evidence only for identity and intent, and gave a specific limiting instruction to the jury. Even if Petitioners had alleged a federal claim, they cannot meet the required elements for a due process violation. The evidence was admitted to show intent, which is a permissible inference for the jury to draw. *See Jammal*, 926 F.2d at 920. Furthermore, the evidence, while damaging, was limited and was not of the type as "necessarily prevents a fair trial." *Jammal*, 926 F.2d at 920; *see also Estelle*, 502 U.S. at 74-75. Therefore, the state court's decision was not unreasonable and no relief is warranted on this claim.

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[35] As the trial progressed, Petitioners conceded the identity issue. (Cal. Ct. App. at 9).

C. McLoren's Civil Liability

Petitioners allege that the court's decision not to allow questioning on McLoren's civil liability violated their constitutional right to confront witnesses. (Miliotti Pet. at 112-14; Micah Pet., Att. 4; Jason Pet. at 6a; Hein Pet. at 66-72). The challenged testimony is as follows:

Sussman: Did you discuss with Mr. Sorkin any possible liability for the death of Jimmy Farris?

Latin: Objection. Attorney-client privilege.

Sussman: That's been waived your honor.

Latin: It's also irrelevant and hearsay and beyond the scope.

Court: I'll sustain it on the latter grounds.

(34 RT 4087). Defense counsel did not pursue this line of questioning. Petitioners allege that the sustained objection was in error and violated their right to cross-examine McLoren about potential interest or bias. (*See* Hein Pet. at 71).

On direct appeal, the California Court of Appeal determined that the trial court did not abuse its discretion because McLoren's civil liability was "at best, speculation and conjecture," and that overwhelming evidence supported conviction even without McLoren's testimony as to Petitioners' intent. (Cal. Ct. App. at 20).

The Sixth Amendment guarantees criminal defendants the right to confront witnesses through cross-examination. *Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986). However, trial judges retain considerable discretion to place reasonable limits on cross-examination to avoid harassment, prejudice,

confusion, repetition, or only marginally relevant testimony. Id. at 679. "A limitation on cross-examination does not violate the Confrontation Clause unless it limits relevant testimony and prejudices the defendant, and denies the jury sufficient information to appraise the biases and motivations of the witness." *United States v. Bensimon*, 172 F.3d 1121, 1128 (9th Cir. 1999) (internal quotes omitted).

Here, the trial judge sustained the objection based on relevance, hearsay, and outside the scope of direct examination. Although Farris' family did later file a civil case against McLoren, there was no evidence that one was contemplated at the time of McLoren's testimony. If defense counsel had knowledge of a civil case, they should have raised the issue outside of the presence of the jury. Instead, counsel did not pursue McLoren's civil liability. Since no civil case was pending at the time, it cannot be shown that the exclusion denied the jury "sufficient information to appraise the biases and motivations of the witness." *Bensimon*, 172 F.3d at 1128. Therefore, the state court's decision denying habeas relief was not unreasonable and no relief shall be granted on this claim.

VIII. Juror Misconduct

Petitioners contend that their Sixth Amendment right to a fair trial was violated by juror misconduct.[36] Petitioners specifically challenge the effect on the jury of Juror No. 3's dismissal and the failure of the trial court to investigate the conduct of Juror No. 10 based on a letter the juror wrote after the trial.

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[36] Only Miliotti and Jason Holland raise this claim.

A. Juror No. 3

The daughter of Juror No. 3 went to high school with Farris' older brother, sat in court with the Farris family on at least one occasion and went to lunch with her mother and five other jurors. When questioned out of the presence of the other jurors, Juror No. 3 stated that she had not discussed the case with her daughter and that she could still be fair and impartial. The court also individually questioned the other jurors who had lunch with Juror No. 3 and her daughter and they each stated that they had not discussed the case and could remain fair and impartial. (35 RT 4157-78). The trial court denied defense counsels' motions to dismiss Juror No. 3 and for a mistrial. Several days later, Juror No. 3 stated that she changed her mind, she no longer felt like she could be fair and impartial and asked to be dismissed. The court dismissed her and sat an alternate juror. This occurred in late April during the prosecution's presentation of their case. (Miliotti Pet., Ex. A at 17-20).

The Sixth Amendment provides that a person accused of a crime has a right to a trial by an impartial jury. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961); *Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir. 1998). An impartial jury is composed of jurors willing and able to decide a case solely on the evidence presented. *Smith v. Phillips*, 455 U.S. 209, 217 (1982). "Jurors are presumed to have performed their official duties faithfully." *James v. Borg*, 24 F.3d 20, 28 n.4 (9th Cir. 1994).

In considering Petitioners' juror misconduct claim on direct appeal, the California Court of Appeal concluded that "there is nothing in the record to suggest that the remainder of the jury was tainted in

any manner by any of the events involving Juror No. 3 or her daughter. Any suggestion to the contrary is sheer speculation." (Miliotti Ans., Ex. A at 18). This Court agrees. The jurors who remained on the case stated that they did not discuss the proceedings with Juror No. 3's daughter and that they could remain fair and impartial. There is nothing in the record to suggest that the remaining jurors' impartiality was hindered. Given that jurors are presumed to fulfill their duties, the state court's determination that no constitutional violation occurred was not an unreasonable determination of federal law nor an unreasonable application of the facts.

B. Letter from Juror No. 10

Petitioners also contend that their fair trial rights were impeded by the trial court's failure to conduct a hearing about possible juror misconduct based upon a letter sent to the court from Juror No. 10 after the trial was completed. (Miliotti Pet. at 32). The letter stated: "Admittedly, I was a cause of 2 days of deliberation because I wasn't sure we had enough to go with 'intent to steal' which was the key to this case. Reasons given by eleven were very reasonable and good as mine but your instruction says that if both were reasonable, numbers win. Am very comfortable with my decision." (See Miliotti Ans., Ex. A at 18-19).

The Ninth Circuit has stated that a "court confronted with a colorable claim of juror bias must undertake an investigation of the relevant facts and circumstances." *Dyer*, 151 F.3d at 974 (citing *Remmer v. United States*, 350 U.S. 377, 379 (1956)). Due process only requires that the investigation "be reasonably calculated to resolve the doubts raised about the juror's impartiality." *Id.*

Here, the trial court did not conduct an investigation into Juror No. 10's conduct based on the letter. The California Court of Appeal concluded that the letter was ambiguous since the juror seemed to misinterpret the court's instructions but also stated that he or she was comfortable with "my decision." (Miliotti Ans., Ex. A at 19). This Court similarly finds that the circumstances of this case did not present a colorable claim of bias which constitutionally required further investigation. This is not a case in which a juror has lied on voir dire or has engaged in some sort of misconduct during the course of the trial. *See e.g., Pope v. Man-Data, Inc.*, 209 F.3d 1161, 1163-64 (9th Cir. 2000). Rather, as the trial court observed, the letter seems to reflect the juror's "mental processing" (Miliotti Ans., Ex. A at 19), and a description of the jury's deliberations.

Further inquiry into the juror's conduct, while perhaps preferable, was not mandatory. "An evidentiary hearing is not mandated every time there is an allegation of jury misconduct or bias." *United States v. Angulo*, 4 F.3d 843, 847 (9th Cir. 1993); *United States v. Langford*, 802 F.2d 1176, 1180 (9th Cir. 1986). Such an inquiry is ordinarily required in cases of significant juror misconduct, jury tampering, or the tainting of the jury process through exposure to extraneous evidence. *See, e.g., United States v. Berry*, 627 F.2d 193, 197 (9th Cir. 1980). This case does not rise to that level. Therefore, the state court's denial of relief on this claim was neither an unreasonable application of Supreme Court precedent nor an unreasonable determination of the facts.

IX. Judicial Misconduct

Petitioner Jason Holland contends that the trial judge engaged in judicial misconduct.[37] (Jason Pet. at 6). Specifically Petitioner alleges that the judge vouched for the sincerity of the prosecution's belief about Petitioners' guilt, failed to sustain an objection to the prosecutor referring to Petitioners as a "pack of wolves," and sustained an objection by the prosecutor to defense counsel's definition of "beyond a reasonable doubt." (*Id.*).

A criminal defendant is guaranteed the right to an impartial judge. *Lang v. Callahan*, 788 F.2d 1416, 1418 (9th Cir. 1986). The Due Process Clause of the Constitution clearly requires a "fair trial in a fair tribunal" before a judge with no actual bias against the defendant or interest in the outcome of his or her particular case. *Bracy v. Gramley*, 520 U.S. 899 (1997). Unfairness is not proved, however, merely by showing that the trial judge ruled against a party repeatedly, ran an efficient courtroom, or had an opinion about a party or counsel based on a current or previous case. *Liteky v. United States*, 510 U.S. 540, 555-56 (1994).

The California Court of Appeal found Petitioners' judicial bias claim wholly without merit concluding that "[Petitioners] merely cite rulings and admonitions with which they disagree." (Cal. Ct. App. at 17). This Court agrees. Petitioner's judicial misconduct claims consist of overruled defense objections and sustained prosecution objections. After overruling defense's objection to the prosecution referring to Petitioners as a "pack of wolves," the judge reminded the jury that attorney statements are not evidence. (46 RT 6327-28).

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[37] None of the other petitioners raise this claim.

Since "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion," *Liteky*, 510 U.S. at 555, and these rulings by the trial court were not exceptional, the state court's conclusion was not an unreasonable application of Supreme Court precedent or an unreasonable determination of the facts. No relief is warranted on this claim.

X. Cruel and Unusual Punishment

Petitioner Jason Holland contends that his conviction and sentence constitute cruel and unusual punishment in violation of the Eighth Amendment. Jason specifically argues that a life sentence without the possibility of parole is cruel and unusual punishment for an "impulsive" homicide committed by an eighteen-year-old with no record of prior violent crimes. (Jason Pet. at Att.).

A mandatory life sentence for first degree murder does not violate the Eighth Amendment. *United States v. LaFleur*, 971 F.2d 200, 211 (9th Cir. 1991) (citing *Hamelin v. Michigan*, 501 U.S. 957, 1005 (1991)). Furthermore, the Supreme Court has upheld extended sentences for lesser crimes under recidivist statues. *See Lockyer v. Andrade*, 538 U.S. 63 (2003) (finding that two consecutive twenty-five years to life sentences for two counts of petty theft with a prior serious felony was not an unreasonable application of federal law).

The California Court of Appeal evaluated Jason's cruel and unusual punishment claim under both the federal and California constitutions and found no violation. The court noted Jason's criminal history, use of drugs and alcohol, and the fact that he was the principal in both the wallet theft and the stabbing of Farris and McLoren. (Cal. Ct. App. at 29-30). The

court concluded that Jason's punishment was neither cruel nor unusual. That determination was not unreasonable. Jason was an adult convicted of first degree murder. He admitted stabbing both Farris and McLoren. He was not sentenced under a recidivist statute, but for his direct participation in the death of Farris. Given the circumstances, Jason's sentence of life without the possibility of parole was neither cruel nor unusual. The state court's determination that his punishment was within the dictates of the Eighth Amendment was therefore not an unreasonable application of Supreme Court precedent.

XI. Arbitrary and Capricious Sentence Reduction

Micah contends that the California Court of Appeal's decision to reduce Miliotti's sentence without reducing his was arbitrary, capricious and fundamentally unfair. (Micah Pet., Att. 6). The state court reduced Miliotti's sentence under the cruel and unusual punishment provision of the California constitution. Respondent asserts that this claim does not present a federal question. (Ans. at 30).

Federal habeas relief does not lie for errors in state law. *See Estelle*, 502 U.S. at 67. Petitioner responds that the court of appeal's arbitrary and capricious decision violated his federal due process rights. This claim has no merit. The court of appeal carefully compared each of the defendants to the defendant in *People v. Dillon*, 194 Cal.3d 441 (Cal. 1983), and concluded that only Miliotti deserved relief. This was reasoned analysis, not the type of fundamental unfairness required for a due process violation. *See Donnelly*, 416 U.S. at 642-43.

Moreover, this Court has not found, and Petitioner has not cited, any Supreme Court case which would compel this Court to find that the Eighth Amendment's prohibition on cruel and unusual punishment applies to a claim of disproportionality between Petitioner's sentence and the sentences of his co-defendant. *See Solem v. Helm*, 463 U.S. 277, 288 (1983) (the Eighth Amendment requires an examination of Petitioner's *sentence* to his *crime*) (emphasis added).

XII. Cumulative Error

Petitioners assert that the cumulative effect of the errors in their case deprived them of the right to a fair trial. (Hein Pet. at 81-82; Miliotti Pet. at 136-37; Jason Traverse at 1; Micah Traverse at 1). To obtain relief under a theory of cumulative error, a petitioner must prove that "although no single trial error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors ... still prejudice[s] a defendant." *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996); *see also Whelchel v. Washington*, 232 F.3d 1197, 1212 (9th Cir. 2000) (noting that cumulative error applies on habeas review). However, if there is no violation of a petitioner's federal rights, there is no reason to reverse for cumulative error. *See Rupe v. Wood*, 93 F.3d 1434, 1445 (9th Cir. 1996).

Here, as discussed in detail above, Petitioners have not established any violation of their constitutional rights. Without a constitutional error, "nothing can accumulate to the level of a constitutional violation." *Mancuso v. Olivarez*, 292 F.3d 939, 957 (9th Cir. 2002); *United States v. Rivera*, 900 F.2d 1462, 1471 (9th Cir. 1990) ("a cumulative-error analysis should evaluate only the effect of matters determined to be errors, not

the cumulative effect of non-errors"). Accordingly, Petitioners' claim of cumulative error is without merit.

XIII. Recommendation

For the reasons stated above, it is respectfully recommended that the Petitions be **DENIED**.

DATED: April 3, 2007

s/Marc L.Goldman
Marc L. Goldman
United States Magistrate Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DAVISON

FILED - SOUTHERN DIVISION CLERK, U.S. DISTRICT COURT
AUG-9 2007
CENTRAL DISTRICT OF CALIFORNIA
BY [ILLEGIBLE] DEPUTY

BRANDON WADE HEIN,	) Case No.) CV 04-3502-SJO (MLG))
Petitioner,	) ORDER ACCEPTING) AND ADOPTING
v.	) FINDINGS AND) RECOMMENDATIONS
JOSEPH SULLIVAN, Warden,	) OF UNITED STATES) MAGISTRATE JUDGE)
Respondent.	))

Pursuant to 28 U.S.C. § 636(b) (1) (C), the Court has reviewed the petition and all of the records and files and has conducted a de novo review of that portion of the Report and Recommendation of the United States Magistrate Judge to which objections were filed. The Court accepts and adopts the findings and recommendations in the Report and Recommendation and orders that judgment be entered denying the petition with prejudice.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order and the Judgment on all parties.

Dated: 8/3/07

s/S. James Otero
S. James Otero
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
JUL 16 2010
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

BRANDON WADE HEIN, Petitioner-Appellant, v. WILLIAM JOSEPH SULLIVAN, Warden of California Correctional Institution, at Tehachapi, California, Substituted for Michael G. Yarborough, Respondent-Appellee.	No. 07-56277 D.C. No. CV-04-03502-SJO- MLG ORDER

TONY MILIOTTI, Petitioner-Appellant, v. JIM HALL, Respondent-Appellee.	No. 07-56288 D.C. No. CV-04-03491-SJO

JASON SKIP HOLLAND, Petitioner-Appellant, v.	No. 07-56365 D.C. No. CV-04-03416-SJO

AL SCRIBNER,
Substituted for George A. Ortiz,
Respondent-Appellee.

MICAH HOLLAND,
Petitioner-Appellant,
v.
DERRAL G. ADAMS,
Respondent-Appellee.

No. 07-56367

D.C. No. CV-04-03407-SJO(MLG)

Before: KLEINFELD and TALLMAN, Circuit Judges, and TRAGER*, District Judge.

The panel has voted to deny the petitions for panel rehearing. Judge Tallman has voted to deny the petitions for rehearing en banc and Judge Kleinfeld so recommends. The full court has been advised of the petitions for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petitions for panel rehearing and the petitions for rehearing en banc are denied.

* The Honorable David G. Trager, United States District Judge for the Eastern District of New York, sitting by designation.

28 U.S.C. § 2254

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART VI. PARTICULAR PROCEEDINGS
CHAPTER 153. HABEAS CORPUS

§ 2254. State custody; remedies in Federal courts

* * *

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

* * *

LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE
BUREAU OF SPECIAL OPERATIONS
HARDCORE GANG DIVISION

MICHAEL E. TRANBARGER • Director

GIL GARCETTI • District Attorney
SANDRA L. BUTTITTA • Chief Deputy District Attorney
R. DAN MURPHY • Assistant District Attorney

July 10, 1995

Dear Mr. Sorkin;

This is to assure you and your client, Michael McLoren, that nothing he tells me or the investigating officers about marijuana will be used in any way against him.

GIL GARCETTI
District Attorney

By s/ Jeff Semow
Jeff Semow
Deputy District Attorney

DECLARATION OF TRACY J. DRESSNER

I, TRACY J. DRESSNER, declare:

1. I was retained by the family of petitioner Tony Miliotti to represent Mr. Miliotti in post-conviction proceedings. Sometime after I was retained, I received from petitioner's uncle, Jeff Ladin, boxes of transcripts and other documents from the case. These boxes included a number of tabbed black binders containing case material. Mr. Ladin told me that those binders had been given to him by petitioner's trial counsel, Curt Leftwich, sometime after the trial ended and comprised Mr. Leftwich's trial file.

2. While reviewing these binders, I found a letter dated July 10, 1995, from prosecutor Jeff Semow to Mr. Sorkin promising use immunity to Michael McLoren. The letter was located in a binder labeled, "Reports 2" and was behind tab #10.

3. As part of my post-conviction investigation, I arranged to view videotaped interviews conducted by William Gazecki, the director of a documentary about this case entitled "Reckless Difference." Mr. Gazecki told me that I could not have a copy of the tapes but allowed me to view the tapes at his home. I viewed tapes at Mr. Gazecki's home on May 15, 2002 and May 24, 2002.

4. The videotapes I reviewed included a lengthy interview with prosecutor Jeff Semow. At the end of tape 2 and the beginning of tape 3 of Semow's interview, Semow discussed the promise of use immunity which he gave to Michael McLoren. On May 24, 2002, I watched that portion of the tapes multiple times while transcribing what Semow said. Attached to this declaration is a transcription of what Semow

said on tape. I verify that the transcript is accurate in all material respects.

5. During the week of June 24, 2002, I exchanged numerous voice mail messages with Bob Wyman, an attorney at Wyman, Isaacs, Blumenthal,& Lynne, who represents the producer of "Reckless Indifference." I asked Mr. Wyman if I could obtain a copy of Semow's tapes. Mr. Wyman stated he could not provide a copy of the tape to me because of liability concerns, but would release a copy if one was sought by subpoena.

I declare under the penalty of perjury that the forgoing is true and correct.

This declaration was signed on July 11, 2002, at La Crescenta, California.

s/ Tracy J. Dressner
TRACY J. DRESSNER

Semow Tape 2 at 18:40:

There was some reticence initially as I recall in his first story to Tauson. And it was when Tauson finally said "Look we are not interested in a marijuana case, this is about life or death" and that sort of thing and we want you to come clean. I'm trying to think now. Was Tauson able to get. . . . I don't know that Tauson fully confronted him at that time and got everything. It got a little closer to the truth that time. I remember personally sitting down with him and his attorney, Ellory Sorkin, in my office there across the hall because Sorkin was concerned that he might be prosecuted for marijuana possession or sale based upon his testimony in the case.

The dilemma that presented for me was that if I had to tell him no I'm going to give you a free pass on that in order to get you to testify, although my belief would be that he would then be a truthful witness because the only thing holding him back was his own fear of prosecution, the defense would be able to spin that and say that I bought his testimony.

I told them for that reason the most I will give you is use immunity which is simply that I promise you I will not use anything you say in court as a basis for prosecution. But I cannot promise you, I will not guarantee that you are immune from prosecution. I mean if someplace, some other time, somebody has got evidence, has got the marijuana and wants to prosecute you based on that without using anything you said in court that's beyond my control. He was not inclined to accept that on his lawyer's advice. I wanted him to talk to me here in the office with the understanding of use immunity. At least tell me

everything he knows and tell me the whole truth, okay, with the understanding nothing he says in this room can be used against him. That's when he came completely clean.

His lawyer gave . . . [Tape ends.]

Semow Tape 3 at the beginning:

[For a prosecutor to prosecute] for marijuana after he felt the witness had been wholly truthful and given relevant testimony in a murder trial, his name would be mud in the criminal justice system. He would be considered an idiot and a dishonorable man but yet to make that guarantee that you won't be an idiot or dishonorable plays into the defense strategy of taking what you have done simply in order to remove the witness's impediments to telling the truth and making it look like your bought lies from him instead. They're able to completely turn it around so you have to avoid, if at all possible, giving him that guarantee.

Anyways, that was, I believe, the first time McLoren gave us the statement that we believe to be completely 100 percent truthful.

But all of the statements were made known to the jury, every one at them. The whole genus of it from they came here to steal my stereo to I'm a marijuana dealer and I had some stuff and that's what they wanted.

EXCERPTS OF REPORTER'S TRIAL TRANSCRIPT PROSECUTION INITIAL SUMMATION

[5914]

* * *

SO THE ISSUE IN THIS CASE IS WHO DO YOU BELIEVE. THAT IS WHAT THE ISSUE SHOULD BE. DO YOU BELIEVE JASON HOLLAND OR DO YOU BELIEVE THE PEOPLE'S WITNESSES? BECAUSE IF YOU BELIEVE THE PEOPLE'S WITNESSES, AND YOU SHOULD, THERE IS NO DOUBT WHATSOEVER THAT THE CRIME COMMITTED BY EACH OF THESE DEFENDANTS IS A BURGLARY AND ATTEMPTED ROBBERY DURING WHICH JIMMY FARRIS WAS KILLED.

* * *

[5923]

* * *

I CAN ONLY SAY ABOUT MICHAEL MCLOREN THAT I THINK IT WAS OBVIOUS THAT HE WAS A WITNESS WHO CAME TO THIS COURT WITH THE UNDERSTANDING THAT HE WANTED TO SEE JUSTICE DONE. HE MADE NO BONES ABOUT IT. HE WANTS TO SEE THAT THE GUYS WHO WERE RESPONSIBLE FOR

JIMMY FARRIS' MURDER, THESE FOUR DEFENDANTS, WERE CONVICTED.

HE UNDERSTOOD THAT IN ORDER TO BE BELIEVED—THIS IS IMPORTANT. HE MADE IT CLEAR IN THE WAY HE TESTIFIED AND EVEN SOME OF THE THINGS HE SAYS THAT HE UNDERSTOOD THAT IN ORDER TO BE BELIEVED HE HAD TO TELL THE JURY THE TRUTH ABOUT EVERYTHING. HE HAD TO ANSWER EVERY QUESTION THAT WAS ASKED OF HIM ON BOTH DIRECT AND CROSS-EXAMINATION TOTALLY AND WHOLLY TRUTHFULLY; THAT HE COULD NOT EXPECT TO BE BELIEVED BY A JURY IF HE DID ANYTHING LESS.

AND IT WAS CLEAR FROM THE WAY HE TESTIFIED THAT HE WAS OPERATING ON THAT PRINCIPLE AND UNDERSTANDING. HE WAS—THE BEST WAY TO DESCRIBE HIM IS HE WAS PAINFULLY HONEST. HE ANSWERED EVERY QUESTION TRUTHFULLY, NO MATTER HOW MUCH IT COST HIM IN TERMS OF PAIN, DISCOMFORT, EMBARRASSMENT AND HUMILIATION. HE IS NOT A MODEL TEENAGER BUT THE MODEL OF A PERFECT WITNESS.

* * *

EXCERPTS OF
REPORTER'S TRIAL TRANSCRIPT
PROSECUTION REBUTTAL SUMMATION

[6218]

* * *

I'M GOING TO TALK TO YOU TOMORROW ABOUT MIKE MCLOREN'S TESTIMONY. I'M GOING TO GO THROUGH IT WITH YOU. NOBODY HAS REALLY—EVERYBODY ATTACKED MIKE MCLOREN, BUT NOBODY REALLY DEALS WITH HIS TESTIMONY ON ITS FACE. EVERYBODY JUST DEALS WITH THE FACT THAT HE DEALS MARIJUANA. EVERYBODY WANTS TO TALK ABOUT HIS MARIJUANA DEALING.

WELL, IT'S A GIVEN, LADIES AND GENTLEMEN. WE DIDN'T TRY TO HIDE THAT FROM YOU. WE DIDN'T TRY TO PRESENT A PICTURE OF HIM THAT HE IS ANYTHING OTHER THAN WHAT HE IS. HE IS A MARIJUANA DEALER. THAT IS WHY HE WAS ATTACKED. THAT IS WHY THE DEFENDANTS WERE THERE. NO QUESTION ABOUT THAT.

HE HAS BEEN DISHONEST IN THE PAST. NO QUESTION ABOUT THAT. BUT BETWEEN NOW AND TOMORROW MORNING—WELL, TOMORROW MORNING WHAT I'M GOING TO ASK YOU TO DO IS THINK BACK TO WHAT YOU WERE FEELING WHILE MICHAEL MCLOREN WAS TESTIFYING, ALL RIGHT? I WANT YOU TO REMEMBER HIS DEMEANOR. I WANT YOU

TO REMEMBER HOW OPEN HE WAS ABOUT EVERY LITTLE [6219] ASPECT OF HIS LIFE.

HE WASN'T LIKE JASON HOLLAND THAT TOLD THE TRUTH THAT HE WANTED TO TELL, THAT HE CHOSE TO TELL. HE UNDERSTOOD THAT IF YOU ARE GOING TO BE BELIEVED YOU BETTER BE PREPARED TO COME IN HERE AND OPEN UP YOUR LIFE NO MATTER WHETHER THE QUESTIONS SEEM RELEVANT TO WHAT HAPPENED OR NOT. AND MANY OF THESE QUESTIONS PROBABLY DIDN'T SEEM RELEVANT. THEY LOOKED LIKE THEY HAD NOTHING TO DO WITH ANYTHING, BUT HE ANSWERED THEM. AND HE OPENED HIMSELF UP TO EMBARRASSMENT, SCORN, RIDICULE, CONTEMPT AND CRIMINAL LIABILITY, BUT HE DID IT BECAUSE HE UNDERSTOOD THAT THAT IS WHAT IT TAKES TO TELL THE TRUTH AND BE BELIEVED.

* * *

[6275]

* * *

HIS ENTIRE LIFE WAS OPENED UP BEFORE YOU, AND HE WAS VERY, VERY HONEST AND OPEN ABOUT EVERYTHING HE HAD DONE THROUGHOUT HIS LIFE, INCLUDING TELLING YOU THAT HE' HAD SMOKED MARIJUANA ON A DAY THAT HE CAME TO COURT. NOW, HE DID TELL YOU THAT HE

WASN'T HIGH AND THAT HE DID NOT KNOW IN ADVANCE THAT HE WAS GOING TO BE COMING TO COURT, BUT THE DEFENSE ATTORNEYS WOULD NOT HAVE HAD THE OPPORTUNITY TO MAKE THE ARGUMENT THEY MADE TO YOU IF HE WASN'T HONEST ABOUT THE [6276] FACT THAT HE DID THAT. HE WAS HONEST ABOUT THE FACT THAT HE DID THAT.

* * *

[6300]

* * *

THINK ABOUT THE WAY YOU FELT WHILE YOU HE TESTIFIED. DIDN'T YOU KNOW IN YOUR HEART HE WAS TELLING THE TRUTH? DIDN'T YOU? HE SPENT A LOT OF TIME UP HERE, AND I KNOW THAT WHEN HE FIRST TESTIFIED YOU HAD TO WONDER, IS HE TELLING THE TRUTH? THINK ABOUT HOW YOU FELT WHEN HE WAS DONE. THINK ABOUT HOW HONEST HE WAS ABOUT SOME VERY, VERY PAINFUL THINGS IN HIS LIFE, SOME THINGS THAT WERE EMBARRASSING, SOME THINGS THAT HOLD HIMSELF OUT TO THE PUBLIC AS NOT A VERY GOOD PERSON. HE WAS SO HONEST ABOUT IT. THAT'S THE KIND OF INTEGRITY THAT OUR SYSTEM WOULD LIKE TO SEE. IT REALLY IS.

* * *

183

No. 10-646

Supreme Court, U.S.
FILED
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In the Supreme Court of the United States

BRANDON WADE HEIN, ET AL., *Petitioners,*

v.

WILLIAM JOSEPH SULLIVAN, ET AL., *Respondents.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Where this Court has never held that the prosecution's constitutional obligation to correct false evidence under *Napue v. Illinois*, 360 U.S. 264 (1959) includes truthful but misleading testimony, and where the circuits are allegedly divided on this issue, should this Court in this federal habeas corpus action arising out of a California state court conviction find that "clearly established Federal law, as determined by the Supreme Court of the United States" (28 U.S.C. § 2254(d)) required the Ninth Circuit to grant relief on the ground that the prosecution failed to correct truthful but misleading testimony?

TABLE OF CONTENTS

Page

Statement of the Case 1

A. State trial court proceedings 1

B. Direct appeal proceedings 2

C. State habeas corpus proceedings 3

D. Federal habeas corpus proceedings 3

E. Federal appellate proceedings 4

Reasons for denying the petition 4

I. Certiorari should be denied because the Ninth Circuit's decision does not fairly present an important question 4

A. The Ninth Circuit's decision implicitly assumes that false evidence under *Napue* can include "misleading" evidence 5

B. If a circuit split is developing over whether misleading evidence should constitute false evidence under *Napue*, the Ninth Circuit has not chosen a side 7

C. The alleged circuit conflict over whether "misleading" evidence is "false" evidence under *Napue* is shallow at best, illusory at worst 8

D. Since there was no clearly established Supreme Court law that false evidence, under *Napue*, included truthful but misleading evidence, the Ninth Circuit's decision should not be disturbed 12

TABLE OF CONTENTS
(continued)

Page

II. Certiorari should be denied because the California Supreme Court reasonably rejected petitioners' *Napue* claim 16

A. The Ninth Circuit correctly concluded that the state court could reasonably determine that there was no false evidence 18

B. The district court correctly concluded that the state court could reasonably determine that any false evidence was not material 22

Conclusion 27

TABLE OF AUTHORITIES

Page

CASES

Akrawi v. Booker,
572 F.3d 252 (6th Cir: 2009)..... 9

Alcorta v. Texas,
355 U.S. 28 (1957)..... 13, 14

Armour v. Salisbury,
492 F.2d 1032 (6th Cir. 1974)..... 10

Blankenship v. Estelle,
545 F.2d 510 (5th Cir. 1977)..... 10

Boone v. Paderick,
541 F.2d 447 (4th Cir. 1976)..... 10

Brady v. Maryland,
373 U.S. 83 (1963)..... 15

Byrd v. Collins,
209 F.3d 486 (6th Cir. 2000)..... 9

California v. Trombetta,
467 U.S. 479 (1984)..... 15

Carey v. Musladin,
549 U.S. 70 (2006)..... 12, 15

Donnelly v. De Christoforo,
416 U.S. 637 (1974)..... 21

Drake v. Portuondo,
553 F.3d 230 (2d Cir. 2009)..... 11

Dupart v. United States,
541 F.2d 1148 (5th Cir. 1976)..... 10

TABLE OF AUTHORITIES
(continued)

Page

Giglio v. United States,
405 U.S. 150 (1972) ..... passim

Hammond v. Hall,
586 F.3d 1289 (11th Cir. 2009) 9

Harrington v. Richter,
131 S. Ct. 770 (2011) 3, 17

Jenkins v. Artuz,
294 F.3d 284 (2d Cir. 2002) 11

Knowles v. Mirzayance,
129 S. Ct. 1411 (2009) 12

Lindh v. Murphy,
521 U.S. 320 (1997) 17

Miller v. Pate,
386 U.S. 1 (1967) 13

Napue v. Illinois,
360 U.S. 264 (1959) ..... passim

Pederson v. Fabian,
491 F.3d 816 (8th Cir. 2007) 9

People v. Dillon,
34 Cal. 3d 441, 194 Cal. Rptr. 390 (1983) 2

Price v. Vincent,
538 U.S. 634 (2003) 16

Smith v. Secretary, Dept. of Corrections,
572 F.3d 1327 (11th Cir. 2009) 9

TABLE OF AUTHORITIES
(continued)

Page

Towery v. Schriro,
No. 08-99022, ___ F.3d ___ 2010
WL 5157357 (9th Cir. Sep. 22, 2010) 7, 8

United States v. Agurs,
427 U.S. 97 (1976) 18, 23

United States v. Bagley,
473 U.S. 667 (1985) 13, 15

United States v. Bynum,
567 F.2d 1167 (1st Cir. 1978) 10

United States v. Harris,
498 F.2d 1164 (3d Cir. 1974) 8, 11

United States v. Iverson,
637 F.2d 799 (D.C. Cir. 1981) 11

United States v. Lochmondy,
890 F.2d 817 (6th Cir. 1989) 9

United States v. McClintic,
570 F.2d 685 (8th Cir. 1978) 10

United States v. Morris,
498 F.3d 634 (7th Cir. 2007) 11

United States v. Ramirez,
608 F.2d 1261 (9th Cir. 1979) 8

United States v. Rivera Pedin,
861 F.2d 1522 (11th Cir. 1988) 10

United States v. Stadtmauer,
620 F.3d 238 (3d Cir. 2010) 11

TABLE OF AUTHORITIES
(continued)

Page

United States v. Vozzella,
124 F.3d 389 (2d Cir. 1997) 12

Williams v. Taylor,
529 U.S. 362 (2000) 12, 17

Woodford v. Visciotti,
537 U.S. 19 (2002) 16

Wright v. Van Patten,
552 U.S. 120 (2008) 12

STATUTES

28 U.S.C. § 2254 ..... 5, 11, 12, 16

STATEMENT OF THE CASE

A. State Trial Court Proceedings

On May 22, 1995, petitioner Jason Holland stabbed seventeen-year-old Jimmy Farris to death. That evening, Jimmy Farris had been in the backyard of his best friend, Michael McLoren, in Agoura Hills, California, when petitioners Jason Holland, Micah Holland, Brandon Hein, and Tony Miliotti entered the backyard uninvited, intent on stealing marijuana from McLoren. During the struggle which followed, petitioner Jason Holland stabbed Farris twice and McLoren four times. Farris's stab wounds killed him, one wound having penetrated his heart.

Sometime after the stabbings, McLoren hired attorney Ellery Sorkin to represent him. In a letter to Sorkin dated July 10, 1995 (the "immunity" letter), Deputy District Attorney Jeff Semow wrote:

> This is to assure you and your client, Michael McLoren, that nothing he tells me or the investigating officers about marijuana will be used in any way against him.

Semow apparently wrote the letter to induce McLoren to be truthful that he was selling marijuana from the fort, and that petitioners had come to steal it, freeing McLoren from the concern that the district attorney was building a case against McLoren for his marijuana dealings.

During the 1996 jury trial in the Los Angeles County Superior Court, McLoren testified that, when he was initially interviewed by Detective Tauson at the hospital, he did not "trust the police" because he was "doing illegal things" and did not feel he "could tell the police everything and talk to them openly and

not suffer the consequences from it." It was not until McLoren talked to Sorkin after his initial interview with Detective Tauson that McLoren "felt ready to tell the truth about [his] involvement with marijuana, the extent of [his] dealing in marijuana, the extent of [his] use of marijuana to the authorities." Also, McLoren testified that it was not until Sorkin told him that he would not "be able to get these guys until [he told] the whole truth" that McLoren was, "for the first time," ready to be honest with law enforcement. The first person McLoren talked to from law enforcement was Deputy District Attorney Semow.

Following the two-month trial, the jury found petitioners guilty of first degree felony murder, with the special circumstances that the murder was committed during the course of a burglary and an attempted robbery. Petitioners were also convicted of first degree burglary and first degree attempted robbery. In addition, petitioner Jason Holland was convicted of assault with a deadly weapon. Petitioner Jason Holland was sentenced to life in state prison without the possibility of parole plus eight years, both petitioners Hein and Miliotti were sentenced to life in state prison without the possibility of parole plus four years, and petitioner Micah Holland was sentenced to twenty-nine years to life in state prison.

B. Direct Appeal Proceedings

The California Court of Appeal affirmed the convictions of petitioners Jason Holland, Micah Holland, and Hein. As to petitioner Miliotti only, the court found insufficient evidence to support the special circumstance findings and struck those findings. Also, based on the holding in *People v. Dillon*, 34 Cal. 3d 441, 194 Cal. Rptr. 390 (1983), the

court found petitioner Miliotti's murder conviction violated California's constitutional proscription against cruel or unusual punishment and modified the judgment by reducing petitioner Miliotti's murder conviction from first degree to second degree murder, resulting in a new sentence of nineteen years to life. The California Supreme Court denied the petitions for review. This Court denied petitioner Hein's petition for writ of certiorari on October 1, 2001.

C. State Habeas Corpus Proceedings

Each petitioner filed a petition for writ of habeas corpus in the California Supreme Court, raising claims that included the one involved in the current petition, that the prosecution violated their due process right to a fair trial by knowingly presenting false testimony from McLoren that he could be prosecuted for selling marijuana (i.e., that there was no immunity agreement) and that he was testifying against petitioners primarily for altruistic reasons. In support of this claim, petitioners relied on *Napue v. Illinois*, 360 U.S. 264 (1959), and *Giglio v. United States*, 405 U.S. 150 (1972). On May 24, 2004, the California Supreme Court summarily denied the petitions on the merits. *See Harrington v. Richter*, 131 S. Ct. 770, 784-85 (2011).

D. Federal Habeas Corpus Proceedings

Each petitioner then filed a petition for writ of habeas corpus in the United States District Court raising several grounds for relief, including the false evidence claim. The court found that although there was false evidence presented that the prosecution knew or should have known about, the evidence was not material in that there was no reasonable

likelihood that it could have affected the jury's verdict. (Pet. App. at 74a-86a.) The court additionally rejected the remainder of petitioners' claims.

E. Federal Appellate Proceedings

The district court granted a certificate of appealability, and petitioners appealed to the United States Court of Appeals for the Ninth Circuit. The Court of Appeals affirmed the judgment in a published opinion. In doing so, the court rejected petitioners' false evidence claim, finding that "although a few of McLoren's statements at trial were incomplete, the critical point of McLoren's testimony, to wit, that he could still be prosecuted for marijuana possession or sale, was true." Analyzing each of McLoren's statements, the court decided that "his testimony, viewed in its entirety, conveyed to the jury an accurate picture of his legal situation . . . . Similarly, *Napue* imposed no duty on [Deputy District Attorney] Latin to clarify McLoren's answers to open-ended questions about his willingness to be a witness or to specifically question him about the July 10 letter." The Ninth Circuit concluded that "[i]t was therefore not objectively unreasonable for the California Supreme Court to deny petitioners' state habeas petitions." (Pet. App. 18a-27a.) On July 16, 2010, the Ninth Circuit denied petitioners' petition for rehearing and rehearing en banc.

REASONS FOR DENYING THE PETITION

I. CERTIORARI SHOULD BE DENIED BECAUSE THE NINTH CIRCUIT'S DECISION DOES NOT FAIRLY PRESENT AN IMPORTANT QUESTION

Certiorari is not appropriate in this case because the Ninth Circuit's unanimous opinion simply

involves a fact-specific and correct application of law, despite petitioners' attempt to demonstrate a conflict with other circuit courts and this Court on the question of whether misleading evidence can ever amount to false evidence. Although the Ninth Circuit's opinion does not expressly decide the issue, it appears to assume that "misleading" evidence can constitute "false" evidence, and then rejects the claim under these particular circumstances. Indeed, in a later decision, the Ninth Circuit noted but declined to decide the issue of whether false evidence encompasses misleading evidence. Further, the allegedly conflicting cases from other circuits appear to be mostly, if not wholly, factually reconcilable. Finally, even if petitioner's claim could otherwise prevail on the merits, it would fail in this case under 28 U.S.C. § 2254(d) because there was no clearly established Supreme Court law that the knowing presentation of false evidence violates due process.

A. The Ninth Circuit's Decision Implicitly Assumes that False Evidence Under *Napue* Can Include "Misleading" Evidence

The petition for writ of certiorari is premised on an assertion that the Ninth Circuit in this case determined that there can be no constitutional violation from the prosecution's failure to correct "misleading" evidence because this is not "false" evidence. According to petitioners, the Ninth Circuit's determination is contrary to this Court's authority and strengthens a conflict in the circuit courts on this question. But the Ninth Circuit never explicitly reached this issue in its opinion. The Ninth Circuit's opinion, rather, appears to assume that misleading evidence can constitute a *Napue* violation,

and to show why the evidence at issue was not misleading.

Near the beginning of the Ninth Circuit's analysis on this issue, it notes that petitioners were claiming that the prosecutor's questioning "was misleading and could be characterized as presenting false evidence." (Pet. App. 19a.) Nowhere in the Ninth Circuit's subsequent discussion does it reject the notion that the presentation of evidence intended to mislead can ever be found "false." Rather, the court's denial of petitioners' false evidence claim is based on its conclusion that as to each piece of evidence, the prosecutor did not deceive the jury or knowingly lead the jury to any misimpression by failing to correct the evidence. In this regard, the Ninth Circuit found that McLoren's "testimony, viewed in its entirety, conveyed to the jury an accurate picture of his legal situation . . . ." (Pet. App. 19a.) The Ninth Circuit explained why each of McLoren's testimonial statements comported with the truth under their "more plausible interpretation . . . ." (Pet. App. 27a.) And, as to the prosecutor's conduct, the Ninth Circuit found that there was no "deliberate" decision not "to expand upon McLoren's answers," especially considering that the prosecutor had "reason to believe that the [immunity] letter was in the hands of the defense . . . ." Under these circumstances, the Ninth Circuit's decision evinces a conclusion that the prosecution did not present or fail to correct misleading evidence in this case. Because the Ninth Circuit's denial of relief was consistent with a ruling that misleading evidence can constitute a *Napue* violation, the question presented is not outcome-determinative.

B. If a Circuit Split Is Developing Over Whether Misleading Evidence Should Constitute False Evidence Under *Napue*, the Ninth Circuit Has Not Chosen a Side

After the Ninth Circuit issued its opinion in this case, it addressed a *Napue* issue in another published case, *Towery v. Schriro*, No. 08-99022, ___ F.3d ___ 2010 WL 5157357, *6 (9th Cir. Sep. 22, 2010), *as amended*, Dec. 21, 2010. In *Towery*, the Ninth Circuit declined to determine whether the evidence at issue "was sufficiently misleading to satisfy the first *Napue* prong," whether the evidence was false, because the petitioner failed to satisfy the second prong, that the prosecution knowingly allowed false evidence. *Id.* The Ninth Circuit, however, did suggest a difference of opinion in the circuit courts on the question:

> There is some support for Towery's view that accurate testimony could be delivered in a sufficiently misleading context to make the evidence false for *Napue* purposes. *Compare United States v. Vozzella*, 124 F.3d 389, 390 (2d Cir. 1997) (recognizing that *Napue* applied to "the use of evidence that was in part false and otherwise so misleading as to amount to falsity"), and *United States v. Barham*, 595 F.2d 231, 240-41 (5th Cir. 1979) (holding evidence was false when witnesses testified they had not been offered leniency by "any of the attorneys" or "anybody in the Northern District of Alabama," but had in fact received promises from other authorities), *with Byrd v. Collins*, 209 F.3d 486, 517 (6th Cir. 2000) (noting that "in order to establish a claim of prosecutorial misconduct or denial of due process, . . . the defendant must show that the statement in

> question was 'indisputably false,' rather than merely misleading." (quoting *United States v. Lochmondy*, 890 F.2d 817, 823 (6th Cir. 1989))).

Towery, 2010 WL 5157357, at *6.

Towery post-dated the opinion in this case by five months, and the Ninth Circuit was presumably aware of its own law when it determined that the issue was unsettled. Because the Ninth Circuit has not taken a position on whether misleading but accurate evidence can violate *Napue*, it would be inappropriate to grant certiorari in this case.

C. The Alleged Circuit Conflict Over Whether "Misleading" Evidence Is "False" Evidence Under *Napue* Is Shallow at Best, Illusory at Worst

Petitioner attempts to pit the circuits against each other on this issue, but it cannot be confidently shown that the courts would necessarily reach different results on the same facts. As indicated, the Ninth Circuit recently declined to resolve the issue of whether evidence needs to be "inaccurate" or only "misleading" to be considered "false" under *Napue*. Yet the case law suggests that the Ninth Circuit would expressly find misleading statements to fall within the purview of *Napue* were it to reach the question on direct review. *See United States v. Ramirez*, 608 F.2d 1261, 1266 n.9 (9th Cir. 1979) ("The prosecutor has a duty to apprise the court when he or she knows the witness is giving misleading testimony" even if the testimony is "perhaps literally true".) (*citing United States v. Harris*, 498 F.2d 1164, 1169 (3d Cir. 1974)).

As to the cases from the other circuits that petitioner cites as requiring inaccuracy for falsity—

the Sixth, Eighth, and Eleventh Circuits—all (save perhaps one case) involve situations where the evidence apparently was *not* misleading, so the articulation of the legal standard made no practical difference. *See Hammond v. Hall*, 586 F.3d 1289, 1306-07 (11th Cir. 2009) (noting that the petitioner was alleging a *Giglio* violation from "misleading testimony," allowing that *Giglio* can involve "misleading testimony," but rejecting the *Giglio* and nondisclosure-of-evidence claims upon finding that the witness was not lying, that her testimony was "literally accurate," and that the relevant impeachment information came out at trial); *Smith v. Secretary, Dept. of Corrections*, 572 F.3d 1327, 1334-35 (11th Cir. 2009) (no *Giglio* error from the prosecutor's argument against the defense claim that two other men colluded together because they did not know each other where it was undisputed that the two men had "met in jail after the murder and had never spoken before that time"); *Pederson v. Fabian*, 491 F.3d 816, 828 (8th Cir. 2007) (no *Napue* error due to the "reasonable interpretation of the witness's statement that is entirely consistent with his earlier statements"); *Byrd v. Collins*, 209 F.3d 486, 517 (6th Cir. 2000) (no error upon finding that the witness was clearly referring to criminal charges, not to future parole revocation hearings, when he testified that he had no charges pending); *United States v. Lochmondy*, 890 F.2d 817, 822 (6th Cir. 1989) (where the defense was provided impeachment material, the witness's "mere inconsistencies in testimony" did not show falsity); *but see Akrawi v. Booker*, 572 F.3d 252 (6th Cir. 2009) (finding the witness's testimony "technically accurate" but "misleading" but finding no reversible error because the "factual discrepancies" were "of relatively minor significance").

Moreover, as petitioner acknowledges, the Sixth, Eighth, and Eleventh Circuits in other cases have conceived misleading evidence to be false evidence. *United States v. Rivera Pedin*, 861 F.2d 1522, 1530 n.14 (11th Cir. 1988); *United States v. McClintic*, 570 F.2d 685, 692 (8th Cir. 1978); *Armour v. Salisbury*, 492 F.2d 1032, 1037 (6th Cir. 1974). These circuits have never acknowledged let alone resolved any intracircuit conflict on this issue. Any such disagreement would properly be addressed by these circuits on rehearing en banc, not by this Court on certiorari.

By the same token, of the seven circuits that petitioner characterizes as being in the camp of considering misleading evidence to be false evidence, only three (the First, Fourth, and Fifth) have found the falsity element satisfied solely on the basis of accurate but misleading evidence. *United States v. Bynum*, 567 F.2d 1167, 1169-70 (1st Cir. 1978) (finding evidence false because an accurate inference from the testimony "would probably be lost on a jury"); *Blankenship v. Estelle*, 545 F.2d 510, 513 (5th Cir. 1977) ("we will not tolerate prosecutorial participation in technically correct, yet seriously misleading testimony which serves to conceal the existence of a deal with material witnesses"); *Dupart v. United States*, 541 F.2d 1148, 1149-50 (5th Cir. 1976) ("such a formalistic exchange of testimony, even though technically not perjurious, would surely be highly misleading to the jury"); *Boone v. Paderick*, 541 F.2d 447, 450 (4th Cir. 1976) (finding evidence false because "the prosecutor made statements which were clearly intended to give the impression that Hargrove knew nothing about possible lenient treatment"). Significantly, none of the *Napue/Giglio* cases from these circuits cited by petitioners arose in the setting of a federal habeas case like this one

where clearly established Supreme Court law is required for relief. *See* 28 U.S.C. § 2254(d). Also, these were factual settings where the evidence was intentionally and highly misleading, not merely subject to possible misinterpretation.

The other four circuits (the Second, Third, Seventh, and D.C.) have found evidence false only in scenarios where all or some of the evidence was inaccurate, or else have found the evidence not to be false in scenarios where there was no indication that the evidence was misleading. *United States v. Stadtmauer*, 620 F.3d 238, 268-69 (3d Cir. 2010) (no finding of falsity where there was no evidence that the witness's testimony was false "other than the inconsistencies between the FBI agent's notes and Zecher's recollection of his statements"); *Drake v. Portuondo*, 553 F.3d 230, 241-42 (2d Cir. 2009) (finding error in "main" part because of the witness's testimony that he had "learned about the facts of the case the night before his testimony" when in fact he had "learned the relevant facts two weeks prior to the trial"); *United States v. Morris*, 498 F.3d 634, 638-40 (7th Cir. 2007) (finding falsity because the prosecutor represented to the jury that the witness's plea agreement to ten years in prison was mandatory and could not be reduced when in fact the government could, and did, "move for a reduction below the statutory minimum"); *United States v. Iverson*, 637 F.2d 799, 802-03 (D.C. Cir. 1981) (finding error because of the witness's testimony that she had already been sentenced when in fact she had not); *United States v. Harris*, 498 F.2d 1164, 1169 (3d Cir. 1974) (finding error because "the witness' answer, although made in good faith, is untrue"); *Jenkins v. Artuz*, 294 F.3d 284, 287-89, 293 (2d Cir. 2002) (finding error in part because of the witness's testimony denying that he had made a deal with the

prosecution when in fact there had been an agreement); *United States v. Vozzella*, 124 F.3d 389, 392-93 (2d Cir. 1997) (finding error in part because the Government offered "two names of 'borrowers' in the Pietrosanti records [that] were fictitious"). The relatively small number of cases that this legal issue has arguably affected suggests that there is no important, "entrenched" split that needs to be resolved by this Court.

D. Since There Was No Clearly Established Supreme Court Law That False Evidence, Under *Napue*, Included Truthful But Misleading Evidence, the Ninth Circuit's Decision Should Not Be Disturbed

Under 28 U.S.C. § 2254(d), a federal court can only grant habeas relief based on an application of clearly established law from this Court. This law "refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000). Where there are no such holdings from this Court, "it cannot be said that the state court 'unreasonably appli[ed] clearly established Federal law,' § 2254(d)." *Carey v. Musladin*, 549 U.S. 70, 76 (2006); *accord Knowles v. Mirzayance*, 129 S. Ct. 1411, 1419 (2009) ("this Court has held on numerous occasions that it is not '"an unreasonable application of clearly established Federal law"' for a state court to decline to apply a specific legal rule that has not been squarely established by this Court"); *Wright v. Van Patten*, 552 U.S. 120, 125 (2008) (denying relief under 28 U.S.C. § 2254(d) because "[n]o decision of this Court . . . squarely addresses the issue in this case").

In the context of resolving false evidence claims, this Court has never held that the prosecution's constitutional obligations entail not only correcting false evidence, but also any evidence tending to mislead. The cases have instead involved situations where the evidence deemed false involved an actual untruth. *See Giglio*, 405 U.S. at 150-55 (where there was an agreement that the witness would not be prosecuted, the witness's testimony that he received no promises that he would not be indicted was false); *Napue*, 360 U.S. at 271 (where the prosecutor had promised to recommend a reduction in the witness's sentence, the witness's testimony that the prosecutor did not so promise was false); *Miller v. Pate*, 386 U.S. 1, 7 (1967) (where the prosecutor knew that the defendant's underwear was stained with paint, the witness's testimony that it was stained with blood was false); *Alcorta v. Texas*, 355 U.S. 28, 30-31 (1957) (where the witness had been the victim's "lover and paramour, and had had sexual intercourse with her on many occasions," the witness's testimony "that his relationship with petitioner's wife had been only 'that of a friend and neighbor,[']and that he had had no 'dates,' nor other relations with her" was false).

In arguing that this Court has already held that the prosecution's use of evidence that "creates a materially misleading impression of the facts" violates due process, petitioners cite two false evidence cases (*Alcorta* and *Giglio*) and one nondisclosure-of-evidence case (*United States v. Bagley*, 473 U.S. 667 (1985)). (Pet. at 16-20.) None of these cases, however, held that a prosecutor's failure to correct evidence that creates a materially misleading impression of the facts violates due process.

As just parenthetically described, the witnesses in *Alcorta* and *Giglio* lied, and did not merely mislead. Yet, petitioner argues that in *Alcorta*, "the Court cited no evidence" supporting that the witness and victim had been on "dates" and simply concluded that the "testimony, *taken as a whole*, gave the jury the *false impression* . . . of casual friendship." (Pet. at 17 (*citing Alcorta* at 31 (emphasis in petition)).) On the contrary, the Court cited the witness's testimony that "his relationship with petitioner's wife had been only that of a friend and neighbor, and that he had had no dates, nor other relations with her," despite the admitted fact that he "had been her lover and paramour, and had had sexual intercourse with her on many occasions . . . ." Moreover, there was no reason for the Court to more precisely explore the witness's testimony because he "issued a sworn statement in which he declared that he had given false testimony at the trial." *Alcorta* at 30.

As to *Giglio*, the prosecutor himself argued to the jury that the witness "received no promises that he would not be indicted," and a prosecutor in the same office later filed an affidavit that "[i]t was agreed that if [the witness] would testify before the Grand Jury as a witness for the Government, . . . he would not be . . . indicted." *Giglio*, 405 U.S. at 152-53 & n.2. Despite this literal contradiction, petitioner attempts to construe conceivably truthful readings of the witness's false statements in question based on the limited information provided in the opinion, but it was undisputed that the statements were false. Likely, the falsity issue was relatively undeveloped because the issue concerned in *Giglio* was whether one prosecutor's knowledge of falsity must be imputed to another prosecutor from the same office.

Nor does *United States v. Bagley*, 473 U.S. 667, constitute clearly established Supreme Court law that false evidence can merely be that which gives a misleading impression. (See Pet. at 19-20.) First, *Bagley* was a case that involved the failure to disclose evidence under *Brady v. Maryland*, 373 U.S. 83 (1963), and was not a case about the prosecution's failure to correct false evidence. And although the two doctrines are related, they are distinct. Whereas *Napue* requires "upon the prosecution a constitutional obligation to report to the defendant and to the trial court whenever government witnesses lie under oath, . . . criminal defendants are entitled to much more than protection against perjury" under *Brady*. *California v. Trombetta*, 467 U.S. 479, 485 (1984). The *Brady* disclosure requirement goes beyond preventing perjury but includes all "exculpatory evidence". *Id.* It was in that context that the opinion found that the "respondent's discovery motion misleadingly induced defense counsel . . . ." *Bagley*, 473 U.S. at 683. Just as importantly, the portion of the *Bagley* opinion (Part III) discussing how opposing counsel was misled by the nondisclosure was from a two-justice plurality, not a majority, and for this reason as well does not constitute clearly established Supreme Court law.

Whether misleading evidence is false evidence "is an open question in [this Court's] jurisprudence"; there is no clearly established Supreme Court law on the issue. *Musladin*, 549 U.S. at 76. Given this Court's emphasis in the "false evidence" line of cases on preventing untrue or perjured testimony, as distinguished from its emphasis in the suppression of evidence line of cases of ensuring the disclosure of all evidence favorable to the accused, it was objectively reasonable to view this Court's precedent as not

necessarily extending the prosecutor's nonadversarial obligations to the correction of all potentially misleading evidence. Language in some circuit cases that accurate or truthful statements do not constitute false evidence under *Napue* is not contradicted by any holding of this Court. Under these circumstances, there is no serious issue about the correct result under 28 U.S.C. § 2254(d).

II. CERTIORARI SHOULD BE DENIED BECAUSE THE CALIFORNIA SUPREME COURT REASONABLY REJECTED PETITIONERS' *NAPUE* CLAIM

As the federal district court and the Ninth Circuit concluded, petitioners are not entitled to relief because the California Supreme Court's rejection of their false evidence claim was not contrary to or an unreasonable application of clearly established Supreme Court law. Specifically, it would be reasonable for the state court to find that the evidence was not false and, moreover, that it was not material.

When a state court adjudicates a claim on the merits, federal habeas corpus relief on that claim is barred unless the state-court adjudication was either (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or was (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *Price v. Vincent*, 538 U.S. 634, 638-39 (2003). This is a "'highly deferential standard for evaluating state-court rulings,' . . . which demands that state-court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002)

(per curiam) (*quoting Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997)).

A state court decision is "contrary to" federal law if it either "applies a rule that contradicts the governing law" as set forth in Supreme Court opinions, or reaches a different decision from a Supreme Court opinion when confronted with materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. at 405-06. A state court makes an "unreasonable application" of federal law if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. *Id.* at 413. Federal habeas corpus relief is not available simply because a federal court independently concludes "that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Williams v. Taylor*, 529 U.S. at 411.

Here, petitioners' claims asserting *Napue* violations were presented for the first time in habeas corpus petitions filed in the California Supreme Court. The California Supreme Court denied relief on these claims without comment or citation of authority. These summary denials constituted rejections on the merits. *Harrington v. Richter*, 131 S. Ct. at 784-85. Under this circumstance, petitioners' burden "still must be met by showing there was no reasonable basis for the state court to deny relief." *Id.* at 784.

A. The Ninth Circuit Correctly Concluded That the State Court Could Reasonably Determine That There Was No False Evidence

This Court has made clear that the "deliberate deception of a court and jurors by the presentation of known and false evidence is incompatible with the rudimentary demands of justice." *Giglio*, 405 U.S. at 153. It is well-settled that "a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103 (1976). The prohibition against the use of false testimony applies even when the testimony in question was relevant only to the witness's credibility. *Napue*, 360 U.S. at 269.

Petitioners allege four instances at trial relating to the immunity letter that allegedly "left the jury with the false impression that McLoren was risking prosecution for his marijuana dealing by testifying." (Pet. at 20-25.) The Ninth Circuit correctly ruled, however, that it was objectively reasonable to find otherwise.

First, petitioners complain that the prosecution allowed false testimony in that "McLoren claimed that his lawyer had not provided him with 'any assurances' regarding whether he would be prosecuted for his marijuana dealing." (Pet. at 20-21.) But, as the Ninth Circuit found, there was nothing false about McLoren's statement for two reasons. First of all, McLoren's testimony regarding his concerns about being prosecuted described McLoren's state of mind *before* the immunity agreement; the line of questioning at trial pertained

to the period of McLoren's initial questioning by detectives on May 26, 1995, before the July 10 letter. Second, McLoren was only granted "use immunity" under the agreement, such that "'nothing he tells [Semow] or the investigating officers about marijuana will be used in any way against him.'" Nothing in this agreement prohibited McLoren from being prosecuted. (Pet. App. 20a-22a.) Because the immunity given McLoren did not require him to testify at trial, let alone to give favorable testimony to the prosecution, his testimony was not false or misleading.

Moreover, the state court could reasonably conclude that even if McLoren lied, there was no evidence that the prosecutors knew the statement was false. The prosecutors would not have been privy to the conversation between McLoren and his attorney, nor could they have discovered the truth or falsity of this testimony, assuming they had that duty, because of the attorney-client privilege.

Second, petitioners argue that McLoren lied or gave misleading testimony when he "answered a series of questions about his motivation for testifying and repeatedly offered altruistic explanations (e.g., to honor his dead friend or because his 'grandma' told him to do it), never acknowledged receiving immunity, and asserted that it was 'more important to get these guys than drugs.'" (Pet. at 21-22.) The Ninth Circuit properly found, however, that "the more plausible interpretation" of "McLoren's statement that it was 'more important to get these guys than drugs'" was "that McLoren was stating that he was testifying at trial because the *prosecution* was concerned only about the murder and did not care about his relatively minor drug crimes. This interpretation comports with McLoren's testimony

that he was told that he was not a priority." (Pet. App. at 27a (emphasis in original).)

The Ninth Circuit also correctly found that McLoren's testimony about his motivations was not false because McLoren merely "listed alternative reasons for his willingness to be a witness, none of which are facially false. Therefore, even if McLoren's failure to mention that use immunity played a role in his decision is viewed with some skepticism, petitioners fail to demonstrate its falsity." (Pet. App. 25a.) And McLoren never testified that his desire to avenge his friend's death was his sole or primary reason for testifying. In fact, McLoren testified that his grandmother's advice did not cause him to tell the truth. (RT at 4085-86.) Accordingly, the best that petitioners could show was that there was an utter absence of evidence on the immunity letter.

Moreover, as the Ninth Circuit noted, there is no proof that McLoren actually knew of the immunity letter to McLoren's counsel, since McLoren never signed it. (Pet. App. at 25a-26a.) Because McLoren's state of mind (i.e., motivation) was the subject of the testimony, his actual knowledge of the letter would have to be shown, not simply the existence of the letter.

Third, petitioners term misleading McLoren's testimony that his grandmother told him "just to take the drug charge and just bust" petitioners because "testifying or cooperating with the authorities in this case could not have led to a drug charge." (Pet. App. 22-23.) But the Ninth Circuit correctly found that the state court reasonably rejected this "colorable claim" because, "if McLoren's grandmother offered the advice before July 10, 1995, McLoren could still have been risking criminal liability. But even assuming the statement was

made after July 10, McLoren's answer was still not false because, as noted earlier, his understanding as to the existence of the July 10 letter has not been established. Moreover, McLoren's statement did not foreclose or diminish the possibility that he was granted use immunity." (Pet. App. 26a-27a.) These reasons amply demonstrated the reasonableness of the state court's rejection of the claim.

Fourth and finally, petitioner asserts that the Ninth Circuit erred in considering solely as a prosecutorial misconduct claim, and in failing to consider as also contributing to a false evidence finding, that Deputy District Attorney Latin argued in rebuttal that, by testifying, McLoren "opened himself up to embarrassment, scorn, ridicule, contempt and *criminal liability*, but he did it because he understood that that is what it takes to tell the truth and be believed" (RT at 6219, emphasis added). (Pet. at 23-25.) The Ninth Circuit correctly found, however, that in the absence of any false evidence on the point, the prosecutor's comment alone could not form the basis of a *Napue* violation, which requires the presentation of false testimony or evidence. As the Ninth Circuit explained, "[a]rgument in summation is hardly equivalent to evidence in its impact on a jury" and it "did not present the same threat to the truth-seeking function of the trial process as false evidence would have. It is, thus, inappropriate to treat it as submission of false evidence." (Pet. App. 33a-34a n.12 (*citing Donnelly v. De Christoforo*, 416 U.S. 637, 646-47 (1974)); *see also* Pet. App. 35a (*citing Donnelly* at 647 ("[A] court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.")).)

Although petitioners rely on *Giglio*, the Court there found additional error from the prosecutor's argument capitalizing on evidence that it had found was false. *See Giglio*, 405 U.S. at 150-55.

And, as the Ninth Circuit noted in finding no misconduct, the prosecutor's comment, while it conceivably could have incorrectly been construed as "that McLoren exposed himself to prosecution for marijuana dealing by testifying," could also have taken as "that McLoren's testimony exposed him to charges of perjury if he lied on the stand." Given that the trial court "had made a number of conscientious evidentiary rulings and timely admonitions throughout summation . . . [i]t is probable that the judge found the statement ambiguous as well." (Pet. App. 30a-31a.) Unlike the unambiguous and false prosecutorial statements in *Giglio*, the reasonable interpretation of the prosecutor's statement supported the determination that the prosecutor did not knowingly present false or misleading testimony.

The Ninth Circuit correctly found that the state courts could reasonably determine that no false evidence was introduced in this case. Petitioner's unmeritorious arguments that the Ninth Circuit misapplied this Court's precedent do not warrant certiorari review.

B. The District Court Correctly Concluded That the State Court Could Reasonably Determine That Any False Evidence Was Not Material

Because the Ninth Circuit correctly found that the state court could reasonably determine that there was no false evidence, it did not decide whether any false evidence was material. However, the district

court soundly rejected petitioners' claim on this basis upon finding that "the jury was already aware of the basic information which undermined McLoren's credibility" and that the evidence of the attempted robbery "was supported by substantial corroborating evidence." (Pet. App. 81a-86a.) As a result, this Court should deny the petition for writ of certiorari because even if it were to rule in petitioners' favor on the issue of the knowing presentation of false evidence, petitioners would still not be entitled to habeas relief.

As stated earlier, the test of materiality is whether there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. *United States v. Agurs*, 427 U.S. at 103. As set forth below, in light of the evidence and record as a whole, the California Supreme Court could reasonably determine that there was no reasonable likelihood that the alleged false testimony and argument could have affected the jury's verdict.

First, long before the immunity agreement, McLoren reported that petitioners attempted to rob him. As the district court correctly recognized, the challenged evidence focused solely on the motivating factors behind McLoren's testimony. However, both before and after the grant of immunity, McLoren consistently reported that petitioners came to the fort to rob him: when McLoren ran into the house after the stabbings, McLoren told his mother that petitioners had come to steal his "stuff" (RT at 4127); when Deputy Knox arrived at the scene, McLoren told him that petitioners had come to steal his electronic equipment (RT at 4655-56); when McLoren talked to Detectives Tauson and Neumann, he told them that petitioners had come to steal his electronic equipment and perhaps also some marijuana and

video games (ER at 171, 185); and when McLoren testified at trial, he testified that petitioners had come to steal marijuana (RT at 3582-84). The only variation was in the objective of the theft, changing from "stuff" to electronic equipment/video games to marijuana. While McLoren admitted only after the immunity letter that marijuana was the target of the theft, the key aspect of McLoren's testimony—that petitioners attempted to rob him—pre-dated the immunity agreement and remained unchanged, unaffected by the grant of immunity. And, as the Ninth Circuit noted in finding no cumulative prejudice from the alleged errors in the case, "the prosecution's 'criminal liability' statement was ambiguous and, in any event, occupied only a brief moment in summation at the end of a long trial and had little risk of rendering the entire trial unfair." (Pet. App. 39a.)

Second, McLoren's credibility was significantly impeached at trial. Although petitioners contend that McLoren's false testimony served to improperly enhance McLoren's credibility (Pet. at 26-28), as the district court aptly recognized: "[E]ven if petitioners had been able to confront McLoren with the immunity agreement, it is not reasonably likely that any cross-examination or additional argument on the subject would have added significantly to the defense, because the jury was already aware of the basic information which undermined McLoren's credibility. Indeed, most of the same ingredients for attacking McLoren's credibility had already been brought out." (*See* Pet. App. 82a.) Specifically, McLoren testified that Detectives Tauson and Neumann told him that they were interested in convicting petitioners for the murder and were not interested in prosecuting him for selling marijuana. (RT at 3648, 3709-10, 3749-50.) Although McLoren

said that he did not receive any assurances against prosecution, he admitted that he told Deputy District Attorney Semow about his dealings with marijuana only after he had retained a lawyer to protect him against prosecution and his lawyer instructed him to tell the whole truth. (RT at 3923, 4070-71, 4087-88.) This was emphasized by the defense in argument. (RT at 5986-87 (defense counsel argued: "'This is a victim that comes with his own attorney. This is a victim who cannot give a statement, who . . . must consult with an attorney. This is a victim who's fearful for his own legal liability for this situation.").) Thus, the jury was aware that McLoren was initially untruthful and changed his testimony only after retaining counsel to deal with the marijuana issue.

Third, as the district court also recognized (*see* Pet. App. 83a), McLoren's testimony that petitioners attempted to rob him—which was the key issue in the case—was supported by substantial, independent evidence. Initially, the manner in which petitioners entered McLoren's backyard was unusual and suspicious. McLoren testified that petitioners "hopped" over his fence and that "nobody does that." (RT at 3569.) Petitioners outnumbered McLoren and Farris two to one, increasing the intimidating nature of the entry into the backyard. Petitioner Micah Holland, who was the first to enter the backyard, had a "crazy expression on his face" and did not respond when McLoren greeted him. Instead, petitioner Micah Holland walked straight into the fort. (RT at 3574, 3578.) Petitioner Jason Holland confirmed McLoren's description of these events. (RT at 4887-89.)

Also, the fact that the fight broke out between petitioner Micah Holland and McLoren immediately after petitioners arrived at the fort, as confirmed by

the testimony of petitioner Jason Holland, was consistent with McLoren's testimony that he was attacked when he refused to give petitioner Micah Holland the keys to the drawer where he kept his marijuana. (RT at 4892-93.) Moreover, petitioners' claim that they intended to buy marijuana was undermined by the fact that Chris Velardo, who had been at the fort earlier that day, chose to wait in his truck while petitioners entered McLoren's property. (RT at 2194-98.) Further, petitioners' behavior, both before and after the stabbings, gives rise to an inference that petitioners intended to rob McLoren. About an hour before the stabbings, petitioners were together at Gates Park when petitioner Jason Holland stole Alyce Moulder's wallet. (RT at 2890-97.) Immediately after petitioner Jason Holland repeatedly stabbed McLoren and Farris, petitioners were observed walking towards Velardo's truck, talking among themselves with smiles on their faces. (RT at 4093-101.)

Based on the foregoing, the district court correctly ruled that the California Supreme Court could reasonably determine that there was no reasonable likelihood that any false testimony concerning the immunity agreement or McLoren's motivations for testifying could have affected the jury's judgment. Because a determination that the allegedly false evidence was not material was not contrary to, or an unreasonable application of, clearly established Supreme Court law, this Court's resolution of the question presented would not change the outcome in this case.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: March 7, 2011

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No. 10-646

In the Supreme Court of the United States

BRANDON WADE HEIN, ET AL.,
PETITIONERS,

v.

WILLIAM JOSEPH SULLIVAN, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

CASES

Alcorta v. Texas,
355 U.S. 28 (1957) 7

Byrd v. Collins,
209 F.3d 486 (6th Cir. 2000) 3, 4

Cole v. Zavaris,
No. 07-cv-01197-WDM-MJW, 2009 U.S. Dist. LEXIS 54457 (D. Colo. June 4, 2009), *appeal denied*, *Cole v. Zavaras*, 349 F. App'x 328 (10th Cir. 2009) 4

County of Allegheny v. ACLU, Greater Pittsburgh Chapter,
492 U.S. 573 (1989) 4

Giglio v. United States,
405 U.S. 150 (1972) 7, 8

Hammond v. Hall,
586 F.3d 1289 (11th Cir. 2009), *cert. denied*, 131 S. Ct. 917 (2011) 3

Hayes v. Ayers,
No. 07-99014, 2011 U.S. App. LEXIS 458 (9th Cir. Jan. 7, 2011) 2, 3

Hayes v. Brown,
399 F.3d 972 (9th Cir. 2005) 1

TABLE OF AUTHORITIES—Continued

Page(s)

Jenkins v. Artuz,
294 F.3d 284 (2d Cir. 2002) 6

Monroe v. Angelone,
323 F.3d 286 (4th Cir. 2003) 5

Pederson v. Fabian,
491 F.3d 816 (8th Cir. 2007) 3, 4

Seminole Tribe v. Florida,
517 U.S. 44 (1996) 4

Smith v. Secretary, Department of Corrections,
572 F.3d 1327 (11th Cir. 2009) 4

Tassin v. Cain,
517 F.3d 770 (5th Cir. 2008) 5

Towery v. Schriro,
No. 08-99022, 2010 WL 5157357 (9th Cir. Sep. 22, 2010) 2

United States v. Agurs,
427 U.S. 97 (1976) 10

United States v. Bagley,
473 U.S. 667 (1985) 8

United States v. Casas,
425 F.3d 23 (1st Cir. 2005), *cert. denied*, 546 U.S. 1199 *and* 547 U.S. 1061 (2006) 5

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. Iverson,
637 F.2d 799 (D.C. Cir. 1980) 6

United States v. Lochmondy,
890 F.2d 817 (6th Cir. 1989) 3

United States v. Morris,
498 F.3d 634 (7th Cir. 2007), *cert. denied*,
553 U.S. 1065 (2008) 6

United States v. Ramirez,
608 F.2d 1261 (9th Cir. 1979) 3

United States v. Sutton,
542 F.2d 1239 (4th Cir. 1976) 5

United States v. Zuno-Arce,
339 F.3d 886 (9th Cir. 2003), *cert. denied*,
540 U.S. 1208 (2004) 1, 2

STATUTES

28 U.S.C. § 2254(d) 5, 6

ARGUMENT

It is now apparent why Respondents initially waived their opposition, leading this Court to call for a response. Respondents are forced to concede that there is a circuit split, and merely attempt to minimize it by suggesting that some key decisions do not mean what they plainly say. This Court's clearly established precedent forbids prosecutors from knowingly deceiving juries with misleading testimony. The Ninth Circuit and several others are inviting prosecutors to play unconscionable games on the line between "mere" intentional deception and outright perjury. This issue potentially affects every criminal case in this country. Review is warranted.

1. Respondents take creative license with the Ninth Circuit's decision, claiming that it "appears to assume that misleading evidence can constitute a *Napue* violation." Opp.5. To the contrary, the Ninth Circuit was crystal clear that testimony must be "'actually false.'" Pet.App.18a (quoting *United States v. Zuno-Arce*, 339 F.3d 886, 889 (9th Cir. 2003), *cert. denied*, 540 U.S. 1208 (2004)); Pet.App.26a n.11 (reiterating that "the testimony must still be actually false") (citing *Hayes v. Brown*, 399 F.3d 972, 980-82 (9th Cir. 2005) (*en banc*)).

The Ninth Circuit acknowledged that McLoren's statements were "incomplete" and could be "viewed with some skepticism," Pet.App.19a, 25a, but once the court of appeals decided that those statements were "accurate," Pet.App.19a, it did not go on to consider whether his testimony was nonetheless misleading. The Ninth Circuit's entire *Napue* analysis centered on the issue of literal falsity. *See, e.g.*, Pet.App.20a ("none of these statements were false"); Pet.App.21a-22a

("testimony ... was clearly not false"); Pet.App.22a ("testimony ... was not false"); Pet.App.25a ("none of these statements are false"); *id.* (alternative reasons for testifying were not "facially false"); Pet.App.27a ("testimony was not false"). And the Ninth Circuit's hyper-technical parsing of McLoren's statements and speculation about far-fetched ways that they could be understood as literally true betrays that it had no interest in assessing whether that evidence actually gave the jury a misleading impression, in context. (Respondents' similar gyrations, *e.g.*, Opp.18-22, illustrate the same point.)

2. Respondents concede that there is a circuit split, and even point this Court to an intervening Ninth Circuit decision that expressly acknowledges it. *See* Opp.7-8 (quoting *Towery v. Schriro*, No. 08-99022, 2010 WL 5157357, at *6 (9th Cir. Sep. 22, 2010), *as amended*, Dec. 21, 2010). Their efforts to minimize the scope or importance of that split are unpersuasive.

First, Respondents are wrong to suggest that *Towery* introduces any ambiguity into Ninth Circuit law. The *Towery* panel acknowledged in *dicta* the circuit conflict over whether "accurate testimony could be delivered in a sufficiently misleading context to make the evidence false for *Napue* purposes," citing only out-of-circuit case law. *Towery*, 2010 WL 5157357, at *6. Its only discussion of *Ninth Circuit* law on this point was to quote *Zuno-Arce*, 339 F.3d at 889, to the effect that the testimony must be "'actually false.'" *Id.* And the Ninth Circuit subsequently re-affirmed its actual falsity requirement in *Hayes v. Ayers*, No. 07-99014, 2011 U.S. App. LEXIS 458, at *42-44 (9th Cir. Jan. 7, 2011). In *Hayes*, the court excused the witness's "mostly equivocal" testimony about when she received

immunity, holding that "[t]he prosecution had no obligation to correct Garcia's qualified testimony about her own reasonably held belief, because it was not actually false." *Id.* at *43-44.[1]

Second, Respondents try to obfuscate the Sixth, Eighth, and Eleventh Circuit cases clearly holding that literal falsity is required, by suggesting that "all (save perhaps one case) involve situations where the evidence apparently was *not* misleading, so the articulation of the legal standard made no practical difference." Opp.9. That claim is speculative and unpersuasive on the facts; the truth is that those cases do not analyze whether any misleading testimony was present, because the courts did not think that question relevant. But several clearly did involve testimony that was at least arguably misleading.[2]

More importantly, Respondents' entire discussion rests on the false premise that the holding of a case is somehow defined by the narrowest rationale for the result that a creative lawyer can hypothesize, rather

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[1] Respondents cite *United States v. Ramirez*, 608 F.2d 1261, 1266 n.9 (9th Cir. 1979). Whatever force the *Ramirez* footnote may have had at the time has faded in the intervening thirty years and been clarified by *Zuno-Arce* and its progeny.

[2] *See, e.g.*, *Hammond v. Hall*, 586 F.3d 1289, 1306 (11th Cir. 2009) (witness testified that she "had never been arrested or spent a single day in jail," even though the State had evidence "implicating her in several violent crimes"), *cert. denied*, 131 S. Ct. 917 (2011); *Byrd v. Collins*, 209 F.3d 486, 517-18 (6th Cir. 2000) (unclear whether witness's testimony regarding pending charges referred only to criminal charges); *Pederson v. Fabian*, 491 F.3d 816, 828 (8th Cir. 2007) (finding "ambiguity inherent in [the witness's] statement"); *United States v. Lochmondy*, 890 F.2d 817, 823 (6th Cir. 1989) (statement by witness "may have been inconsistent with other evidence presented in the case").

than by the reasoning the court actually gave. The law does not work that way. "When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound." *Seminole Tribe v. Florida*, 517 U.S. 44, 67 (1996); *see also Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 668 (1989) ("As a general rule, the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law.") (Kennedy, J., concurring in judgment in part and dissenting in part).

The Sixth, Eighth, and Eleventh Circuit decisions are crystal clear that to prevail "the defendant must show that the statement in question was 'indisputably false,' rather than merely misleading." *Byrd v. Collins*, 209 F.3d 486, 517 (6th Cir. 2000); *see also Pederson v. Fabian*, 491 F.3d 816, 828 (8th Cir. 2007) (considering only *Napue* claims where the statements are "unambiguous and false"); *Smith v. Sec'y, Dep't of Corr.*, 572 F.3d 1327, 1335 (11th Cir. 2009) ("Accurate statements do not violate the *Giglio* rule.").[3] The district courts and subsequent panels in those circuits are bound by that rule. Respondents' speculation that

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[3] The Tenth Circuit may be in the minority as well. *See Cole v. Zavaris*, No. 07-cv-01197-WDM-MJW, 2009 U.S. Dist. LEXIS 54457, at *57 (D. Colo. June 4, 2009) ("Significantly, a habeas petitioner must show that a witness'[s] statement was 'indisputably false,' rather than misleading, to establish a denial of due process based on the knowing use of false or perjured testimony.") (quoting *Byrd*, 209 F.3d at 517-18), *appeal denied*, *Cole v. Zavaras*, 349 F. App'x 328 (10th Cir. 2009).

the panels in some of those cases *could* have reached the same result by another route is irrelevant.[4]

Third, Respondents commit similar errors when discussing the circuits on the other side of the split.

Respondents concede that the First, Fourth, and Fifth circuits have found *Napue* violations "on the basis of accurate but misleading evidence," Opp.10, but contend that none of those cases arose in a habeas context. That is factually wrong—at a minimum, both *Tassin v. Cain*, 517 F.3d 770, 776 (5th Cir. 2008), and *Monroe v. Angelone*, 323 F.3d 286, 297 (4th Cir. 2003), were habeas cases decided under 28 U.S.C. § 2254(d)—and irrelevant. None of the courts of appeals had any trouble identifying and applying this Court's clearly established precedent. *See, e.g.*, *Tassin*, 517 F.3d at 778 ("*Giglio* and *Napue* set a clear precedent ...."); *United States v. Casas*, 425 F.3d 23, 44 (1st Cir. 2005) (finding the "at best, misleading" testimony in violation of *Giglio*), *cert. denied*, 546 U.S. 1199 *and* 547 U.S. 1061 (2006); *United States v. Sutton*, 542 F.2d 1239, 1243 (4th Cir. 1976) ("[A]s in [*Napue*], here the prosecution allowed a false impression to be created at trial ...."). Nor do Respondents support their bald statement that the cases are distinguishable because they involved "factual settings where the evidence was intentionally and highly misleading, not merely subject to possible misinterpretation." Opp.11. As explained in our Petition, *see* Pet.29-34, many of these cases involved

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[4] Respondents' reliance on older cases in these circuits, Opp.10, is no more persuasive than its citation to *Ramirez* in the Ninth Circuit. *See supra* n.1. These circuits obviously no longer follow those decisions and the fact that several circuits have struggled with this issue over time only highlights the wide-spread confusion and disarray justifying review by this Court.

fact patterns just like this one, where prosecutors intentionally concealed immunity or lenient treatment afforded to their witnesses.

Respondents argue that the Second, Third, Seventh, and D.C. Circuit cases involved false or inaccurate statements as well as misleading ones. Opp.11-12. Cases can certainly involve *both* misleading and false testimony, but nothing in those cases indicates that the courts required actual falsity in order to reverse under *Napue*. Once again, Respondents try to put their own gloss on the underlying *facts* in these cases while ignoring the reasoning the courts actually gave for their decisions. *See, e.g., United States v. Iverson*, 637 F.2d 799, 805 n.19 (D.C. Cir. 1980) (noting that a prosecutor must correct testimony regardless of whether it is "technically perjurious *or* merely misleading") (emphasis added). Respondents employ parentheticals to identify certain statements as "inaccurate" when the court actually identified them as misleading. *See, e.g., Jenkins v. Artuz*, 294 F.3d 284, 294 (2d Cir. 2002) (prosecutor elicited "technically accurate testimony" that created a "false impression"); *United States v. Morris*, 498 F.3d 634, 640 (7th Cir. 2007) ("Here, the prosecutor's *misleading statement* ran the *risk* of facilitating untruthful testimony from Peterson ....") (emphasis added), *cert. denied*, 553 U.S. 1065 (2008).

3. Respondents seek to bar review of Petitioners' claim under 28 U.S.C. § 2254(d) by asserting that "this Court has never held that the prosecution's constitutional obligations entail not only correcting false evidence, but also any evidence tending to mislead." Opp.13. But this Court has repeatedly

characterized evidence with a tendency to mislead as "false" for *Napue* purposes.

As the petition explained, the witness's testimony in *Alcorta v. Texas* that he had never gone on "dates" with the defendant's wife and that they were not "in love" may have been literally true. 355 U.S. 28, 29-31 (1957). This Court held that a new trial was necessary because "Castilleja's testimony, *taken as a whole*, gave the jury the *false impression* that his relationship with petitioner's wife was nothing more than a casual friendship," when in fact they had a sexual relationship. *Id.* at 31 (emphasis added). Respondents try to make the testimony seem literally false by asserting that "the Court cited the witness's testimony that 'his relationship with petitioner's wife had been only that of a friend and neighbor, and that he had had no dates, nor other relations with her.'" Opp.14 (citing *Alcorta*, 355 U.S. at 30). But that quote is not from Castilleja's actual testimony; it is an embellishment drawn from the defendant's habeas petition in *Alcorta*. *See* 355 U.S. at 30. Of course the defendant in *Alcorta* was interested (like Respondents here) in making Castilleja's testimony seem even more misleading and literally false than it actually was. This Court saw no need to parse Alcorta's characterization or hunt for literal falsity in Castilleja's testimony; it was enough that the actual quoted portions of that testimony gave the jury a "false impression."

Giglio v. United States, 405 U.S. 150 (1972), involved a combination of misleading half-truths by a witness and a statement by the prosecutor that was literally false. Respondents emphasize the prosecutor's false statement and downplay the witness's misleading testimony, Opp.14, but this Court's reasoning drew no

such distinction. Regardless, a prosecutor in this case (Latin) made an equally false statement in summation that similarly sharpened the misleading character of McLoren's prior testimony. *See* Pet.12. Latin's statement, in combination with McLoren's testimony, was no less an instance of "deliberate deception" of the court and jury than occurred in *Giglio*. 405 U.S. at 153.

Finally, Respondents overstate the distinction between non-disclosure cases based on *Brady* and false testimony cases based on *Napue*. *See* Opp.15. A plurality of this Court has identified the common roots of the two doctrines, *see United States v. Bagley*, 473 U.S. 667, 678-79 & n.8 (1985), and rejected the excuse that "technically correct" statements would insulate "misleading[]" representations by the Government, *id.* at 684.

4. Judging from their question presented, Respondents do not seriously deny that McLoren's testimony was fundamentally "misleading." Instead, Respondents rehash the same literal falsity analysis put forth by the Ninth Circuit, which our Petition addressed. *See* Pet.20-25. They also raise a few novel arguments which we address below.

First, Respondents suggest for the first time that McLoren's claim that his lawyer gave him no assurances that he would not be prosecuted was not false because the question was limited to McLoren's state of mind prior to the immunity agreement. Opp.18-19. But a simple review of the exchange shows the question had no temporal limitations, Pet.8-9, and even the Ninth Circuit did not suggest otherwise.[5]

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[5] Respondents may be confused because the Ninth Circuit elected to review this statement collectively with earlier

Second, Respondents argue that McLoren's answer was not false because his immunity deal did not require him to give favorable testimony. Opp.19. That is a non-sequitur and does not bear on McLoren's claim that he was exposing himself to prosecution. Although Respondents try to hypothesize scenarios in which McLoren's answer could literally be true, they do not even attempt to argue that a jury would understand it as anything other than an outright denial that McLoren had received immunity.[6]

Third, Respondents also change course on the issue of DDA Latin's statement in closing argument that McLoren's testimony exposed him to "criminal liability." Pet.App.130a-31a. In conflict with the Ninth Circuit, Respondents now acknowledge that *Giglio* held that a prosecutor's false statement in closing argument is relevant to the falsity inquiry. Opp.14. However, Respondents then backtrack on their concession below that Latin's statement was "certainly incorrect," and embrace the Ninth Circuit's speculation that Latin might have been referring to a potential prosecution for perjury. *Compare* Opp.22 *with* Pet.23-25. The Petition explained why that theory is absurd and dangerous, Pet.24, and Respondents offer no

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testimony from McLoren that related to a specific meeting with two police officers. Pet.App.20a-21a.

[6] Respondents suggest that the prosecution would not have known that McLoren was lying because it was not privy to conversations between McLoren and his lawyer. This suggestion is facially wrong—since DDA Semow admitted to meeting with both McLoren and his lawyer to work out the terms of the immunity agreement, Pet.App.126a-27a—and legally irrelevant as the prosecution would have a duty to correct testimony it knew to be false, even if Semow and McLoren's attorney had, for some unknown reason, conspired to keep McLoren in the dark.

serious contrary argument. In context the jury plainly would have understood Latin's comment as referring to a potential marijuana prosecution.

The false evidence in this case is self-evident. McLoren refused to testify absent immunity for his marijuana dealing, yet told the jury that he had received no assurances and was testifying out of a sense of loyalty to his dead friend, even if it meant that he had to "take the drug charge." Pet.5, 7-11. Whether or not McLoren managed to skirt outright perjury, there is no question that his testimony, taken as a whole, left the jury with the false impression that he was testifying to his detriment in order to see justice done. The prosecution knew full well that the jury had been deceived, and cemented that deception in its closing statement.

5. Respondents concede that false testimony is material if it "*could* have affected the judgment of the jury." Opp.23 (citing *United States v. Agurs*, 427 U.S. 97, 103 (1976)) (emphasis added). This is one of the most lenient materiality standards known to the law, and it plainly is satisfied here.

First, Respondents claim that McLoren's motivation for testifying somehow was beyond challenge because he "consistently reported that petitioners came to the fort to rob him." *Id.* But McLoren's story changed several times, and on more than one occasion he described the incident as a "fight" without mentioning a theft at all. Pet.5 & n.5. The cause of the fight was a hotly disputed issue, McLoren's credibility was the central issue at trial, and with knowledge of the immunity agreement the jury may have believed that McLoren manufactured the

robbery story in order to protect his deal with the prosecution.

Second, Respondents assert that "McLoren's credibility was significantly impeached at trial." Opp.24. But the evidence Respondents cite—that McLoren "changed his testimony only after retaining counsel to deal with the marijuana issue" (Opp.25)—is precisely why it was so critical for the jury to learn how the "marijuana issue" was resolved. If McLoren chose to testify despite his fear of legal liability, it lends him enormous credibility. If, however, he only testified after receiving immunity, the jury would be more skeptical of his account. Given that the entire case boiled down to McLoren's testimony, any evidence touching on his potential bias was material. *See* Pet.26-27.

Third, Respondents contend that McLoren's testimony "was supported by substantial, independent evidence." Opp.25. But most of the "evidence" Respondents cite cuts both ways. If Petitioners intended to rob McLoren, it made little sense to send the small, 15 year old Micah into the fort first. The spontaneity of the fight could just as easily be explained by the fact that all of the boys were intoxicated and McLoren was "'kind of angry.'" Pet.28 (citation omitted). And the robbery theory is undermined both by the fact that Petitioners did not actually take any marijuana.

CONCLUSION

In this case, four teenage boys (one only fifteen years old) were sent to prison for life because they lived in a circuit that has drifted away from this Court's clearly established precedent. The petition for certiorari should be granted.

Respectfully submitted,

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